TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 146

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,
APPELLANTS,

vs.

SOUTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT ALABAMA

FILED JUNE 24, 1950.

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INDEX

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[fols. 1-2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 645-N

SOUTHERN RAILWAY COMPANY, a Corporation, Plaintiff,

v.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, Its President, and Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, Defendants

COMPLAINT—Filed December 6, 1949

The above named plaintiff, complaining of the above named defendants, alleges:

1. Plaintiff, Southern Railway Company, is and was at the times hereinafter stated, a corporation organized and existing under the laws of the State of Virginia, and as such is engaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points within the State of Alabama on the one hand and points in other states throughout the south on the other hand, and as such common carrier is subject to the jurisdiction of the Alabama Public Service Commission and the Interstate Commerce Commission, respectively.

[fol. 3] 2. The defendant, Alabama Public Service Commission, consisting of a President and two Associate Commissioners, is and was at the times hereinafter stated, an administrative body, created under the laws of the State of Alabama, (Title 48, § 1, Code 1940) and authorized under the laws of the State of Alabama to exercise certain regulatory powers over plaintiff, and other common carriers by railroad, (Title 48, § 106, Code 1940). The principal office and official domicile of said Commission is located in the City of Montgomery, County of Montgomery, State of Alabama, being within the Middle Judicial District of the State of Alabama, and the Northern Division thereof. (Title 48, § 11, Code 1940). Defendant Persons, is Presi-

dent, and defendants Hitchcock and Owen, are Associate Commissioners, of said Commission, and defendant Carmichael is Attorney General for the State of Alabama, and are citizens of the State of Alabama and residents of Montgomery, Montgomery County, located in the Middle Judicial District of Alabama, and the Northern Division thereof. Defendant Carmichael, as Attorney General of the State of Alabama, is by the statutes of said state charged with the supervision and control of legal proceedings in behalf of the State of Alabama, and is attorney for Defendant Alabama Public Service Commission.

3. This is a suit of a civil nature between citizens of different states, and arises under the Fourteenth Amendment to the Constitution of the United States, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

4. By Title 48, § 35 and § 106, of the Code of Alabama of [fol. 4] 1940, plaintiff, and other common carriers by railroad, are required to file an application with defendant Commission for a permit to abandon passenger train service and obtain from the Commission a permit allowing such abandonment before it shall abandon operation of passenger service on its lines of railroad in Alabama. No standards for the guidance of the Commission are prescribed, and plaintiff is advised and believes, and therefore alleges, that the statutes are unconstitutional and void as an unlawful delegation of legislative power. Nevertheless, in compliance therewith, plaintiff, on, to-wit, the 13th day of September, 1948, filed with defendant Commission an application for authority to discontinue the operation of two certain interstate passenger trains then being operated daily between Birmingham, Alabama, and Columbus, Mississippi, to-wit:

> Train No. 11, leaving Birmingham at 4:00 p. m., arriving Columbus at 8:45 p. m.
>
> Train No. 16, leaving Columbus at 6:00 a. m., arriving at Birmingham at 10:30 a. m.

Attached to said application and made a part thereof was "Exhibit A", which showed that plaintiff's operation of said two passenger trains for the 12-months period from March 1947 to February 1948, inclusive, showed that the

wages for the train and engine crews and the pay roll taxes paid by plaintiff for the benefit of said crews, plus train fuel consumed in the operation of said trains, approximated the total amount of gross revenue earned by said trains from the handling of passengers, mail, and express, and further, that in the light of other direct expense of their operation [fol. 5] the total cost of direct expense exceeded the total gross revenues for said 12-months period by $63,613.24. Plaintiff attaches a copy of said application and "Exhibit A" thereto to this complaint, marked "Exhibit No. 1", to which reference is prayed for a more complete understanding of said application.

5. In compliance with Service Order 843 issued by Division 3 of the Interstate Commerce Commission on October 21, 1949, a copy of which is hereto attached, marked "Exhibit No. 2" and made a part hereof, plaintiff, effective at 11:59 p. m., October 25, 1949, discontinued operation of its said passenger trains numbers 11 and 16 between Birmingham and Columbus, Mississippi, and said trains have not been operated since they were so discontinued. At the same time and under the same order plaintiff discontinued the operation of its passenger trains numbers 1 and 2, between Sheffield and Parish, Alabama; its passenger trains 7 and 8, between Sheffield, Alabama, and Chattanooga, Tennessee; and its mixed trains numbers 15 and 16, between Selma and Wilton, Alabama.

6. On, to-wit, the 10th day of November 1949, plaintiff filed in the pending cause, before the Alabama Public Service Commission, its Supplemental Petition seeking therein authority from said Commission to be relieved of the necessity of restoring the operation of said passenger trains within the State of Alabama. In said Supplemental Petition the further losses sustained in the operation of said passenger trains from March 1, 1948 to September 30, 1949, inclusive, are set out. Such losses from the operation of said two passenger trains as shown by the original petition and the Supplemental Petition have become progressively [fol. 6] heavier and more burdensome. While such losses for the twelve month period March 1, 1947 to February 29, 1948, inclusive, amounted to $63,613.24 as appears from paragraph 4 hereof, for the succeeding twelve month period March 1, 1948 to February 28, 1949, inclusive, such losses amounted to $80,555.78, and for the succeeding seven month

period from March 1, 1949 to September 30, 1949, inclusive, such losses amounted to $63,340.68 as shown by said supplemental petition, a copy of which with its exhibits is attached hereto identified as "Exhibit No. 3".

7. After the filing, on September 13, 1948, of its original petition with the defendant Commission, for authority to discontinue its said two passenger trains, numbers 11 and 16, submitted herewith as "Exhibit No. 1," plaintiff requested and urged the defendant Commission repeatedly, beginning with September 29, 1948, that the petition be set down for hearing. Since the filing of plaintiff's Supplemental Petition with the defendant Commission on November 10, 1949 plaintiff has also urged that its Supplemental Petition, together with its original Petition, be set down for hearing while said two passenger trains 11 and 16 are discontinued under Service Order No. 843 of the Interstate Commerce Commission, described in paragraph 5 hereof, but the defendant Commission refused to do so and notified plaintiff, emphatically, that it would not hear either plaintiff's Supplemental Petition or its original Petition until the operation of said two passenger trains 11 and 16 is restored. Not until November 18, 1949 was plaintiff advised by defendant Commission that its said original Petition for authority to discontinue operation of said two passenger trains had been set down for hearing at the Court House at Fayette, Alabama, on December 8, 1949. At the same time it was again made clear that the restoration of operation of the two trains was a prerequisite to the hearing.

[fol. 7] 8. On October 26, 1949, defendant Alabama Public Service Commission, issued and served upon plaintiff a notice, to the effect that the operation of all passenger trains discontinued under the aforesaid Interstate Commerce Commission Service Order be restored to service within 24 hours after said service order might be rescinded. A copy of said notice is hereto attached and made a part hereof, identified as "Exhibit No. 4."

9. Under date of November 14, 1949, Division 3 of the Interstate Commerce Commission issued its Service Order 843-A, vacating and setting aside its Service Order No. 843, described in paragraph 5 of this complaint, effective at 11:59 P. M., November 20, 1949. A copy of said Service Order No. 843-A is attached hereto as "Exhibit No. 5."

In response to said Service Order No. 843-A, plaintiff, on November 18, 1949, advised defendant Alabama Public Service Commission, that it would, on November 21, 1949, restore the operation of said passenger trains Numbers 1 and 2, between Sheffield and Parrish, Alabama; said passenger trains numbers 7 and 8, between Sheffield, Alabama, and Chattanooga, Tennessee; and said mixed trains numbers 15 and 16, between Selma and Wilton, Alabama; and the operation of all of said six trains was in fact restored on November 21, 1949. In addition thereto and on the same date, one of plaintiff's attorneys sent to the Commission a Western Union wire reading as follows:

"Washington, D. C., November 18, 1949.

"Honorable Gordon Persons, President,
Alabama Public Service Commission,
Montgomery, Alabama

"Following our telephone conversation day before yesterday I came to Washington to confer with management of Southern Railway with reference to our supplemental petition for permission to keep out of service trains 11 and 16 between Birmingham and Columbus. I understand the other six trains discontinued under the Order of the ICC will be restored to service promptly in keeping with the Commission's requirement of October 26th addressed to all railroads. The management feels, as I do, that we are entitled to a hearing on our supplemental petition on trains 11 and 16 and we hope the Commission can see its way clear to give it to us promptly.

J. T. Stokely
10:47 AM"

In response to that wire, and on the same date defendant Commission by its President telephoned plaintiff's said attorney that the application for authority to discontinue said trains Nos. 11 and 16 had been set for hearing at Fayette, [fol. 8] Alabama, on December 8, 1949 as shown in paragraph 7 hereof and at the same time reaffirmed the advice theretofore given that a hearing would not be had unless said two trains were back in operation.

10. Plaintiff further shows that on November 22, 1949, it received at its general office in Washington from the defendant Commission a Western Union wire asking that

plaintiff wire the Commission whether the plaintiff intended to immediately restore the operation of said two trains Nos. 11 and 16 and plaintiff replied on the same date that under the circumstances it could not see its way clear to restore the trains until a hearing on its said supplemental petition for authority to keep them out of service. Copies of said two wires are attached hereto and made a part hereof being identified as "Exhibit No. 6". On the same date, plaintiff's said attorney in a telephone conversation with the President of defendant Commission advised in substance to the same effect. In that same telephone conversation the President of defendant Commission advised that it would go ahead with the hearing set for December 8, 1949 although it had felt that a hearing should be withheld until said trains were restored to operation.

11. Plaintiff further shows that following said exchange of wires and said telephone conversation set forth in paragraph 10 hereof, the defendant Alabama Public Service Commission issued an order to the plaintiff to appear before the Commission at its office in Montgomery, Alabama, at 2:00 P. M. Friday, November 25, 1949, to show cause, if any, why the defendant Commission should not enter an order requiring the plaintiff to restore the operation of its said trains Nos. 11 and 16 between Birmingham, Alabama, and the Mississippi State line. A copy of said order of the defendant Commission is attached hereto and made a part hereof identified as "Exhibit No. 7".

12. Plaintiff further shows that in response to said order described in paragraph 11 hereof, it appeared before the defendant Commission as required by said order through its attorneys and officers with its witnesses prepared to show the tremendous losses incurred in the operation of said trains before they were discontinued under said I.C.C. Service Order on October 25, 1949; the remaining passenger service on said line of railroad between Birmingham, Alabama and Columbus, Mississippi, which plaintiff insists is adequate; the improved highways substantially paralleling its said line of railroad between Birmingham, Alabama and the Mississippi State line and all the facts in detail showing why the operation of said two passenger trains Nos. 11 and 16 should not be restored; but the defendant Commission refused to permit said witnesses to testify and refused to receive any evidence of the character

[fol. 9]

which plaintiff proposed, to which action of the defendant Commission plaintiff duly excepted. Before the conclusion of said abortive hearing, plaintiff requested the defendant Commission if it made an order requiring said two passenger trains Nos. 11 and 16 to be restored to service that it suspend the effective date of such order until after the hearing on said defendant's applications set at Fayette, Alabama, for December 8, 1949 and after a decision of the defendant Commission on said applications. However, the Commission on, to-wit, the 5 day of December, 1949 entered an order requiring plaintiff to restore the operation of said two passenger trains effective on the 5 day of December, 1949, as per a copy thereof attached hereto and made a part hereof, identified as "Exhibit No. 8".

Said hearing on the defendant Commission's order to show cause was a mere sham and pretense and utterly lacking in due process of law under the Constitution of the State of Alabama and under the Fourteenth Amendment to the Constitution of the United States.

13. With the operation of said trains Nos. 11 and 16 discontinued the line of railroad between Birmingham, Alabama and Columbus, Mississippi is served by plaintiff's mixed trains Nos. 15 and 12. The passenger equipment of these trains are a standard seventy foot passenger car partitioned for white and colored passengers with separate toilets for men and women in each end of the car, and also a standard mail, express and baggage car with railway post office in one end in charge of a R. P. O. clerk, the rest of the car being used for storage mail, express, and bag-
[fol. 10] gage, if any, with an express messenger in charge. The trains operate on convenient schedules. No. 15 leaves Birmingham at 7:15 A. M. arriving Columbus, Mississippi 1:15 P.M. No. 12 leaves Columbus, Mississippi at 1:30 P.M. arriving Birmingham 7:30 P.M. These trains run well on time, make all stops, do very little switching and coupled with improved paralleling highway facilities for busses and private automobiles render adequate service to the territory served between Birmingham and Columbus. A copy of plaintiff's timetable showing the schedules of said trains Nos. 15 and 12 as well as the schedules of said trains Nos. 11 and 16 before they were discontinued under said I.C.C. Service Order 843 is attached hereto and made a part hereof being identified as "Exhibit No. —.

The area in the several counties of Alabama through which plaintiff's line of railroad between Birmingham, Alabama and Columbus, Mississippi extends and over which said mixed trains Nos. 15 and 12 operate, and over which said trains Nos. 11 and 16 operated before they were discontinued, is traversed by improved state highways, substantially paralleling plaintiff's line of railroad through said several counties over which common carrier bus lines and private automobiles are extensively operated. Attached hereto, and marked "Exhibit No. —", and made a part hereof, is a statement comparing motor vehicle registrations in said counties and in the State as a whole for the license years 1939 and 1948. Also attached hereto and made a part hereof, marked "Exhibit No. —", is a statement of the ratio of persons eighteen years of age and over per registered automobile in the state of Alabama, by five-year periods, 1910-1945, inclusive. Said exhibits show the substantial and rapidly increasing use of the highways, and accounts for the little use formerly made by the traveling public of plaintiff's trains Nos. 11 and 16.

In addition to the loss of passenger traffic due to the severe competition of busses and private automobiles over said highways adjacent to plaintiff's said line of railroad, the substantial loss to plaintiff in the operation of said trains Nos. 11 and 16 was also due in part to the greatly increased cost of fuel, materials, supplies and wages.

[fol. 11] 14. In addition to its application for authority to discontinue the operation of its local passenger trains Nos. 11 and 16 between Birmingham, Alabama and Columbus, Mississippi, filed on September 13, 1948, and its supplemental application filed on, to-wit, November 10, 1949, asking authority not to restore the operation of these two trains after they had been discontinued on October 25, 1949, under said I. C. C. Service Order No. 843, the plaintiff has in the last two years filed similar applications for authority to discontinue said two local passenger trains Nos. 1 and 2 operating between Birmingham and Sheffield, Alabama, and said two local passenger trains Nos. 7 and 8 operating between Sheffield, Alabama and Chattanooga, Tennessee.

The first of said applications, for authority to discontinue its two local passenger trains Nos. 1 and 2 was filed on the 24th day of February, 1948, was not set for hearing

until the 8th day of July, 1948 at which time the hearing was continued over the plaintiff's objections and protest on a requirement of the Commission for one month's test period of freight earnings of said line. The hearing was resumed on the 7th day of October, 1948 when the evidence was concluded and the case submitted. Plaintiff before the first hearing amended its application to propose, if the Commission required it, the substitution of a mixed train service in lieu of said two passenger trains. It offered on the first hearing evidence to the effect that direct expense only of the operation of said trains Nos. 1 and 2 for the twelve month period, March 1, 1947 to February 29, 1948, inclusive, amounted to $112,008.98, while the revenue of its said two trains for the same twelve month period amounted to only $33,286.96, showing a loss of direct expense over actual revenue for the period of $78,722.02, or approximately $6,500.00 per month. The month of July, 1948 was with the approval of the defendant Commission selected as the month's test period required and on the adjourned hearing plaintiff showed that the operation of both freight and passenger service on the line between Sheffield and Parrish, Alabama, for the month resulted in a net railway operating income of only $2,646.18, a rate of return of only 0.68 percent on the investment in railway (road) property [fol. 12] used in said transportation service. Notwithstanding the showing of the heavy losses in passenger service for said twelve month period and the result of the operation of both freight and passenger service on the line for said month's test period, the defendant Commission after holding the case under consideration until May 13, 1949 denied the plaintiff's said application to discontinue the operation of plaintiff's said two passenger trains Nos. 1 and 2 and denied plaintiff's proposal to substitute mixed train service therefor. Plaintiff took an appeal from said order of the defendant Commission denying its said application to the Circuit Court of Montgomery County where the case is now pending.

The other application, for authority to discontinue the operation of said two local passenger trains Nos. 7 and 8 operating between Sheffield, Alabama and Chattanooga, Tennessee, was filed on, to-wit, September 13, 1948. After repeated requests that the application be set down for hearing the defendant Commission on March 25, 1949 set

it for hearing at Huntsville, Alabama on June 2, 1949. On May 12, 1949 the Commission continued the hearing to August 4, 1949, and again on July 11, 1949 the defendant Commission again continued the hearing to October 6, 1949 when the application was heard by three members of the defendant Commission's staff, none of the defendant Commissioners being present. The testimony was taken and the case was submitted on that date. On the hearing plaintiff offered in evidence the direct expense of the operation of said two local passenger trains for the twelve month period March 1, 1947 to February 29, 1948, inclusive, which amounted to $177,553.66, and also offered in evidence the total revenue of said trains for the same period which amounted to only $98,842.92, resulting in a loss in direct expense over actual revenue for the period of $78,710.74, or approximately $6,500.00 per month. Plaintiff likewise offered in evidence the direct expense of operation of said two local passenger trains for the twelve month period March 1, 1948 to February 28, 1949, inclusive, which amounted to $182,283.20, and also offered in evidence the total revenue of said two local passenger trains for the same period which amounted to $79,956.28, resulting in a loss of direct expense over actual revenue for the twelve month period of $102,326.93, or approximately $8,500.00 [fol. 13] per month. Plainfiff likewise offered in evidence the direct expense of said two local passenger trains for the five month period March 1, 1949 to July 31, 1949, inclusive, which amounted to $84,437.84 and also offered in evidence the total revenue of said two local passenger trains for the same five month period which amounted to $30,745.28, resulting in a loss in direct expense over actual revenue for the five month period of $53,692.56, or approximately $10,500.00 per month.

The defendant Commission still has said application for the authority to discontinue the operation of said two local passenger trains Nos. 7 and 8 under advisement and no decision on said application has yet been rendered.

The cavalier treatment thus accorded by the Commission to the plaintiff and to its said three applications for authority to discontinue the operation of its said six local passenger trains Nos. 11 and 16, Nos. 1 and 2, and Nos. 7 and 8 shows a deliberate course on the part of the defendant Commission of procrastination and delay resulting in the

continued and continuing heavy losses to the plaintiff from the operation of its said six local passenger trains, thereby depriving plaintiff of its property without due process of law and denying to the plaintiff the equal protection of the law in violation of the Constitution of the state of Alabama and of the Commerce Clause and the Fifth and Fourteenth Amendments of the Constitution of the United States.

15. Plaintiff avers that defendant Commission and its Members should have given to plaintiff a prompt hearing of its said application "Exhibit 1" hereto, filed on September 13, 1948, for authority to discontinue the operation of its said trains Nos. 11 and 16 and the opportunity of presenting promptly the facts set-out in its said application and should have thereupon rendered its decision promptly on said application. Plaintiff's property has been effectively taken by the long, continued and unreasonable delay on the part of defendant Commission and its Members in hearing and deciding plaintiff's said application. Plaintiff is advised and believes and therefore avers that the failure on the part of the defendant Commission to grant to plaintiff a prompt hearing and a prompt decision of said [fol. 14] application is tantamount to a denial thereof. Plaintiff further avers that defendant Commission and its Members in failing to hear and decide plaintiff's application has required the operation of said two passenger trains Nos. 11 and 16 in the public service, thereby taking plaintiff's property for public use without just compensation, denying to plaintiff due process of law and the equal protection of the law and unduly burdening interstate commerce in violation of the Constitution of the State of Alabama and of the Commerce Clause and the Fifth and Fourteenth Amendments of the Constitution of the United States.

Plaintiff is advised and believes and therefore avers that the refusal by defendant Commission to hear plaintiff's said supplemental petition for authority to keep said two passenger trains Nos. 11 and 16 out of service was likewise a denial to plaintiff of due process of law and of the equal protection of the law under said Constitutional provisions.

Plaintiff further avers that said order of the defendant Commission of December 5, 1949, "Exhibit No. 8" hereto, requiring plaintiff to restore said two passenger trains Nos. 11 and 16 to service, having been made without a lawful

hearing as shown by paragraph 12 hereof, seeks to deprive plaintiff of its property without just compensation and denies to plaintiff due process of law and the equal protection of the law in violation of said Constitutional provisions.

16. Plaintiff further avers that if it restores the operation of said trains Nos. 11 and 16 as required by said order of the defendant Commission of December 5, 1949, it will sustain heavy losses from their operation at the rate of approximately $9,000.00 per month. The plaintiff would have no means of recovering such losses and they would be irreparable. On the other hand, if the plaintiff fails to restore the operation of said trains Nos. 11 and 16 as required by said order of the defendant Commission of December 5, 1949, the plaintiff and its officers, agents and employees will incur liability for severe penalities and fines under Title 48, Sections 110, 399, 400 and 405 of the Code of Alabama ranging from $500.00 to $2,000.00 for each day of such failure to restore said two trains to service.

[fol. 15] 17. Plaintiff is informed and believes and therefore avers that if it fails to restore said two passenger trains Nos. 11 and 16 to service as required by said order of the defendant Commission of December 5, 1949 the defendants will under the provisions of the said Title 48 of the Alabama Code immediately undertake the imposition of said severe penalties and fines, thereby subjecting the plaintiff, its officers, agents and employees to a multiplicity of suits on account thereof.

18. Plaintiff has exhausted all administrative remedies available to it and without the protection of the equitable powers of this Court will be remediless.

Wherefore, plaintiff prays:

1. That plaintiff's bill be received, filed and docketed in the records of this court.

2. That process issue requiring defendants and each of them to appear and answer plaintiff's complaint.

3. That a special court of three judges be organized to hear and determine this cause as provided by Title 28, U. S. C. Section 2284.

4. That on a hearing, after at least five days' notice of such hearing shall have been given to Hon. James E. Folsom, Governor, and to defendant, A. A. Carmichael, Attorney General of the State of Alabama, an interlocutory injunction pending the final disposition of the cause be issued enjoining defendants, separately and severally, from proceeding against the plaintiff, its officers, agents or employees to enforce any penalties or other remedies provided under the laws of the State of Alabama on account of plaintiff's or their failure to restore the operation of said two passenger trains Nos. 11 and 16 between Birmingham, Alabama and the Mississippi State line as required by said order of defendant Alabama Public Service Commission of December 5, 1949; and that on final hearing such interlocutory injunction be made permanent.

5. That this Court in order to prevent irreparable damage to plaintiff, enter an order without notice temporarily restraining the defendants, jointly and severally, from each [fols. 16-17] and every act against which an interlocutory and permanent injunction is sought as set out in the prayer above numbered 4, on the giving of bond in such amount as the Court may fix, approved and conditioned as required by law.

6. That plaintiff have such other, further and different relief as may be just and equitable, and plaintiff prays for general relief.

(S.) J. T. Stokely, 1038 Brown-Marx Bldg., Birmingham, Alabama; (S.) Charles Clark, Southern Railway Bldg., Washington, D. C., Attorneys for Plaintiff, Southern Railway Company. Benners, Burr, Stokely & McKamy, of Counsel (Birmingham, Ala.). Rushton, Stakely & Johnston, of Counsel (Montgomery, Ala.).

Duly sworn to by Harold C. Mauney. Jurat omitted in printing.

[fol. 18] EXHIBIT 1 TO COMPLAINT

BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION

Docket No. —

PETITION OF SOUTHERN RAILWAY COMPANY TO DISCONTINUE PASSENGER TRAINS NOS. 11 AND 16 OPERATED BETWEEN BIRMINGHAM, ALABAMA, AND COLUMBUS, MISSISSIPPI.

J. T. Stokely, Charles Clark, Attorneys for Petitioner.

Dated: ——

The petition of Southern Railway Company respectfully shows:

I

Petitioner is a corporation of the State of Virginia and as such is engaged as a common carrier by rail of persons and property in intrastate commerce between points within the State of Alabama and in interstate commerce between points in the State of Alabama on the one hand and points in many other states on the other hand.

II

Petitioner as such common carrier operates two passenger trains daily between Birmingham, Ala., and Colum- [fol. 19] bus, Miss., a distance of 122 miles.

Schedule No. 16:	Leave Columbus	6:00 AM
	Leave Fern Bank	6:42 AM
	Arrive Birmingham	10:30 AM
Schedule No. 11:	Leave Birmingham	4:00 PM
	Arrive Fern Bank	7:59 PM
	Arrive Columbus	8:45 PM

III

Petitioner seeks authority to permanently discontinue the operation of said passenger trains because they are little used by the public and because the cost of operating said trains greatly exceeds the total revenue earned by said trains. Petitioner attaches hereto, as Exhibit A, statement of two sheets showing the operating results of said trains for the twelve-month period March 1947 to February 1948,

inclusive. Said exhibit shows total revenue amounted to $69,695.25 for hauling passengers, mail and express. The wages paid the train and engine crews, the Federal payroll taxes thereon and the train fuel consumed plus a small live-stock claim alone amounted to $68,087.09. Other direct expenses incurred in the operation of said trains such as repairs to locomotives, cars, and the like, amounted to $65,221.40, or total direct expenses of $133,308.49.

The total direct expense of operating these trains exceeded the total revenues, for the twelve-month period, by [fol. 20] $63,613.24. The expenses of operation included in the foregoing items are only certain direct expenses and do not include anything for overhead, dispatching, supervision, maintenance of roadway and structures, ticket agents, ticket office expense, and the like. Had those items been included, the loss would have been even greater.

IV

The territory between Birmingham, Parrish, Fayette and Columbus, through which said trains operate, is served by improved highways available to the public use in driving private automobiles and trucks, and adequate bus service is maintained over said highways.

V

Your petitioner is posting at each station served by said trains Nos. 11 and 16 a notice of the filing of this petition, in the form of Exhibit B hereto, and petitioner will upon the expiration of the required ten-day posting period file with this Commission proof of such posting.

VI

The continued operation by your petitioner of Trains Nos. 11 and 16 between Birmingham and Columbus will constitute an undue burden on interstate commerce and [fol. 21] will involve the taking of petitioner's property without due process of law and be a denial to your petitioner of the equal protection of the law contrary to the provisions of the Constitution of the State of Alabama and of the United States.

Wherefore, your petitioner prays for the reasons hereinabove stated, and others to be shown at the hearing, that

it may be duly authorized and permitted in the manner prescribed by law to discontinue the operation of said passenger trains Nos. 11 and 16 between Birmingham, Ala., and Columbus, Miss., in so far as the same are operated in Alabama.

Southern Railway Company, by H. C. Mauney, Its Superintendent. J. T. Stokely (1038 Brown-Marx Bldg., Birmingham, Ala.), Charles Clark (Southern Railway Bldg., Washington, D. C.), Attorneys for Petitioner.

[fol. 22]

EXHIBIT "A" TO PETITION

Schedule 3—Sheet 1 of 2

Southern Railway Company

Operating Result of Passenger Trains Nos. 11 and 16 between Birmingham, Ala., and Columbus, Miss.

2—146

	March 1947	April 1947	May 1947	June 1947	July 1947	August 1947	September 1947
Revenues:							
Passenger	$3,182.46	$3,029.11	$3,309.30	$4,485.80	$5,221.87	$5,646.78	$4,024.58
Mail	1,716.59	1,666.02	1,710.82	1,649.61	1,690.25	1,679.93	1,632.29
Express	459.13	478.61	355.40	262.94	208.69	228.90	234.32
Miscellaneous	1.24	3.34	2.58	3.50	3.08	2.71	2.20
Total Revenues	$5,359.42	$5,177.08	$5,378.10	$6,401.85	$7,123.89	$7,558.32	$5,893.49
Direct Expenses—"Actual":							
Wages, Train and Engine Crews	$3,091.03	$3,026.76	$3,045.87	$2,986.42	$3,109.95	$3,087.65	$3,040.49
Payroll Taxes, R. R. Ret. & U. I.	230.35	232.43	237.66	233.69	233.57	239.41	228.62
Train Fuel	2,031.12	2,030.40	2,086.92	2,008.80	2,092.50	2,287.80	2,473.20
Damage to Livestock on Right of Way	.....	.....	.....	.....	40.00	.....	.....
Total Direct Expenses—"Actual"	$5,352.50	$5,289.59	$5,370.45	$5,228.91	$5,476.02	$5,614.86	$5,742.31
Direct Expenses—"Apportioned":							
Enginehouse Expenses	$550.25	$577.80	$574.12	$554.70	$508.71	$517.70	$543.00
Pass. Locos.—Water	107.40	103.94	107.40	103.94	107.40	107.40	103.94
Pass. Locos.—Lubricants	183.04	177.14	183.04	177.14	183.04	183.04	177.14
Pass. Locos.—Other Supplies	99.08	95.90	99.08	95.90	99.08	99.08	95.90
Pass. Locos.—Repairs	2,663.27	2,577.38	2,663.28	2,577.38	2,663.28	2,663.28	2,577.38
Pass. Train Cars—C.H.L.W. & Icing	329.69	317.99	330.28	319.74	344.34	360.73	353.12
Pass. Train Cars—Lubricants	22.90	22.08	22.94	22.20	23.92	25.05	25.42
Pass. Train Cars—Other Expenses	18.32	17.67	18.36	17.76	19.12	20.05	19.62
Pass. Train Cars—Repairs	679.98	655.86	681.20	659.46	710.18	744.02	728.30
Pass. Train Cars—Air Cond.	10.58	10.24	10.58	10.24	10.58	10.58	10.24
Birmingham Terminal Company	905.82	760.35	654.50	831.74	844.76	685.17	794.00
Total Direct Expenses—"Apportioned"	$5,570.34	$5,316.35	$5,344.78	$5,370.20	$5,514.41	$5,416.10	$5,427.16
Total Direct Expenses—Actual and Apportioned	$10,922.84	$10,605.94	$10,715.33	$10,599.11	$10,990.43	$11,030.96	$11,169.47
Direct Expenses in Excess of Revenues	$5,563.42	$5,428.86	$5,337.13	$4,197.26	$3,866.54	$3,472.64	$5,275.98

17

[fol. 22-A]

EXHIBIT "A" TO PETITION—Continued

Schedule 3—Sheet 2 of 2

Southern Railway Company

Operating Result of Passenger Trains Nos. 11 and 16 between Birmingham, Ala., and Columbus, Miss.

	October 1947	November 1947	December 1947	January 1948	February 1948	Total 12 Months
Revenues:						
Passenger	$3,653.50	$3,182.83	$4,063.92	$2,822.96	$2,532.95	$45,156.06
Mail	1,728.14	1,702.12	1,919.24	1,726.98	1,627.33	20,449.32
Express	254.98	385.82	465.94	347.37	385.94	4,068.04
Miscellaneous	1.16	.85	.52	.44	.11	21.83
Total Revenues	$5,637.78	$5,271.62	$6,449.62	$4,897.75	$4,546.33	$69,695.25
Direct Expenses—"Actual":						
Wages, Train and Engine Crews	$3,125.30	$3,242.87	$3,346.18	$3,327.84	$3,150.50	$37,580.86
Payroll Taxes, R. R. Ret. & U. I.	231.63	243.53	244.85	178.25	171.80	2,705.79
Train Fuel	2,527.74	2,446.20	2,561.22	2,566.80	2,437.74	27,550.44
Damage to Livestock on Right of Way	.....	210.00	.....	.....	.....	250.00
Total Direct Expenses—"Actual"	$5,884.67	$6,142.60	$6,152.25	$6,072.89	$5,760.04	$68,087.09
Direct Expenses—"Apportioned":						
Enginehouse Expenses	$488.87	$488.10	$526.07	$535.99	$495.32	$6,360.63
Pass. Locos.—Water	107.40	103.94	107.40	107.40	100.48	1,268.04
Pass. Locos.—Lubricants	183.04	177.14	183.04	183.04	171.24	2,161.08
Pass. Locos.—Other Supplies	99.08	95.90	99.08	99.08	92.70	1,169.86
Pass. Locos.—Repairs	2,663.28	2,577.38	2,663.28	2,663.28	2,491.46	31,443.94
Pass. Train Cars—C.H.L.W. & Icing	353.71	365.41	391.76	339.06	309.20	4,115.03
Pass. Train Cars—Lubricants	24.56	25.38	27.20	23.54	21.48	285.77
Pass. Train Cars—Other Expenses	19.65	20.30	21.76	18.84	17.18	228.63
Pass. Train Cars—Repairs	729.52	753.67	808.02	699.32	637.72	8,487.25
Pass. Train Cars—Air Cond.	10.58	10.24	10.58	10.58	9.90	124.92
Birmingham Terminal Company	826.18	813.28	871.93	810.60	777.92	9,576.25
Total Direct Expenses—"Apportioned"	$5,505.87	$5,430.74	$5,710.12	$5,490.73	$5,124.60	$65,221.40
Total Direct Expenses—Actual and Apportioned	$11,390.54	$11,573.34	$11,862.37	$11,563.62	$10,884.64	$133,308.49
Direct Expenses in Excess of Revenues	$5,752.76	$6,301.72	$5,412.75	$6,665.87	$6,338.31	$63,613.24

[fol. 23] EXHIBIT 2 TO COMPLAINT

(Copy)

Title 49—Transportation and Railroads

Chapter I—Interstate Commerce Commission

Subchapter A—General Rules and Regulations

Part 95—Car Service

Service Order No. 843

Restrictions on Coal-Burning Passenger Service Locomotive Mileage

At a session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 21st day of October, A. D. 1949.

It appearing, That reserve stocks of railroad locomotive fuel coal have decreased; that some such reserves have reached a dangerously low level and are further decreasing; that the supply and movement of cars and trains and "car service" generally is impeded and interrupted by the lack of locomotive fuel coal; that the present production of bituminous coal is insufficient to relieve these conditions and adequately supply such fuel, and the Commission being of the opinion that an emergency exists requiring immediate action in all sections of the country;

It is ordered, That:

§ 95.843 *Restrictions on coal-burning passenger service locomotive mileage.*

(a) *Reduction in passenger locomotive mileage.* On and after the effective date of this order, any common carrier by railroad operating coal-burning steam locomotives and having 25 or less days supply of fuel coal for such locomotives and not having available a dependable source of supply of coal, shall reduce its coal-burning passenger locomotives miles to an amount of 25% less than it operated such coal-burning passenger locomotives on October 1, 1949.

(b) *Application.* (1) The provisions of this order shall apply to intrastate commerce, as well as interstate and foreign commerce.

(2) The provisions of this order shall apply to coal-burning passenger locomotive operation commencing on and after the effective date hereof.

(c) *Effective date.* This order shall become effective at 11:59 p.m., October 25, 1949.

(d) *Expiration date.* This order shall continue in effect until 11:59 p. m., December 25, 1949, unless otherwise modified, changed, suspended or annulled by order of the Commission.

(e) *Rules, regulations and practices suspended.* The operation of all rules, regulations, and practices insofar as they conflict with the provisions of this order, is hereby suspended.

It is further ordered, That a copy of this order shall be served upon the State railroad regulatory bodies of each state, and upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register.

(40 Stat. 101, Sec. 402; 41 Stat. 476, Sec. 4; 54 Stat. 901; 49 U.S.C. 1 (10)-(15).

By the Commission, division 3.

W. P. Bartel, Secretary. (Seal.)

[fol. 24] EXHIBIT 3 TO COMPLAINT

BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION

Docket No. —

Supplemental Petition of Southern Railway Company Concerning Interstate Passenger Trains Nos. 11 and 16 Formerly Operated Between Birmingham, Alabama and Columbus, Mississippi, Now Discontinued Under Order of the Interstate Commerce Commission

J. T. Stokely, Charles Clark, Attorneys for Petitioner.
Dated: November 9, 1949.

To the Honorable Alabama Public Service Commission.

Comes Southern Railway Company and files this petition supplemental to its original petition herein filed on September 13, 1948 and respectfully shows:

I

Petitioner filed as Exhibit "A" to its original petition herein a statement showing the operating results of its said trains Nos. 11 and 16 for the twelve-month period ending February 29, 1948. The heavy losses of $63,313.24 there shown have not only since continued but have progressively grown heavier and more unbearable.

The statement marked Exhibit "C" attached hereto shows the operating results of said two interstate trains for the twelve-month period immediately following the twelve-month period covered by Exhibit "A", that is, from March 1, 1948 to February 28, 1949, inclusive. Said Exhibit "C" shows total revenue amounted to $52,720.20 for hauling [fol. 25] passengers, mail and express. The wages paid the train and engine crews, the Federal payroll taxes thereon and the train fuel consumed plus personal injury and property damage claims and suits alone amounted to $80,559.65. Other direct expenses incurred in the operation of said trains such as repairs to locomotives, cars, and the like, amounted to $52,716.33, or total direct expenses of $133,275.98. The total direct expense of operating these trains exceeded the total revenues for the twelve-month period, by $80,555.78.

Petitioner attaches hereto as Exhibit "D" a statement showing the operating results of said trains for the seven-month period, March 1, 1949 to September 30, 1949, inclusive, immediately following the twelve-month period covered by Exhibit "C". Said Exhibit "D" shows total revenue amounted to $29,971.96 for hauling passengers, mail and express. The wages paid the train and engine crews, the Federal payroll taxes thereon, and the train fuel consumed plus personal injury and property damage claims and suits alone amounted to $54,894.08. Other direct expenses incurred in the operation of said trains such as repairs to locomotives, cars, and the like, amounted to $38,418.56, or total direct expenses of $93,312.64. The total direct expense of operating these trains exceeded the total revenues, for the seven-month period, by $63,340.68.

II

The operation of said interstate trains Nos. 11 and 16 was [fol. 26] discontinued on October 26, 1949, under an order issued by the Interstate Commerce Commission on account of the shortage of coal brought about by the current strike in the bituminous coal fields east of the Mississippi River including Alabama by the United Mine Workers of America, resulting in the closing down of all, or substantially all of the coal mines in said fields. The little use of said two interstate trains by the public and the heavy losses in their operation before they were discontinued on October 26, 1949 do not justify the resumption of their operation after said order of the Interstate Commerce Commission shall have expired according to its terms at 11:59 P. M. December 25, 1949, or shall have in the meantime been modified, changed, suspended or annulled, and the shortage of coal shall have been relieved.

III

The requirement by the Commission of the resumption of operation by your petitioner of said interstate passenger trains Nos. 11 and 16 between Birmingham, Alabama and Columbus, Mississippi would constitute an undue burden on interstate commerce and would involve the taking of petitioner's property without due process of law and be a denial to your petitioner of the equal protection of the law

contrary to the provisions of both the Constitution of the State of Alabama and of the United States.

Wherefore, your petitioner prays for the reasons herein- [fol. 27] above stated, and others to be shown at the hearing, that it not be required to restore the operation of said two interstate passenger trains Nos. 11 and 16 between Birmingham, Alabama and Columbus, Mississippi when the coal shortage shall have been relieved and that it be duly authorized by the Commission not to restore the operation of said trains insofar as the same are operated in the state of Alabama.

Southern Railway Company, by H. C. Mauney, Its Superintendent.

[fol. 28]

EXHIBIT "C" TO SUPPLEMENTAL PETITION

Southern Railway Company

Operating Results of Passenger Trains Nos. 11 and 16 between Birmingham, Ala., and Columbus, Miss., for the period from March 1, 1948, to February 28, 1949, Inclusive

	Train No. 11	Train No. 16	Total 12 Months Total
Revenues			
Passenger	$15,326.26	$14,619.17	$29,945.43
Mail	11,827.30	7,604.24	19,431.54
Express	1,320.52	1,969.13	3,289.65
Milk & Newspapers	20.37	33.21	53.58
Total	$28,494.45	$24,225.75	$52,720.20
Direct Expenses—"Actual"			
Wages, Train and Engine Crews	$17,819.26	$17,819.28	$35,638.54
Payroll Tax—R. R. Retirement & Unemp. Ins.	1,009.83	1,009.79	2,019.62
Train Fuel	10,869.48	10,869.50	21,738.98
Injuries to Persons	21,112.51	.....	21,112.51
Damage to Property	.....	50.00	50.00
Total Direct Expenses—"Actual"	$50,811.08	$29,748.57	$80,559.65
Direct Expenses—"Apportioned"			
Enginehouse Expenses	$1,895.62	$1,895.61	$3,791.23
Pass. Locomotives—Water	345.76	345.07	690.83
Pass. Locomotives—Lubricants	588.94	587.78	1,176.72
Pass. Locomotives—Other Supplies	304.41	303.87	608.28
Pass. Locomotives—Repairs Steam	10,162.12	10,144.85	20,306.97
Pass. Train Cars—C. H. L. W. & Icing	1,627.29	1,626.73	3,254.02
Pass. Train Cars—Lubricants	374.66	374.61	749.27
Pass. Train Cars—Other Expenses	110.24	110.20	220.44
Pass. Train Cars—Repairs	2,260.44	2,259.29	4,519.73
Pass. Train Cars—Air Conditioning	177.14	177.36	354.50
Pass. Train Cars—Repairs to Motor Car and Trailer	3,945.79	3,945.78	7,891.57
Rent Paid for Equipment	2.80	.....	2.80
Terminal Station Expenses—Birmingham, Ala.	4,541.25	4,608.72	9,149.97
Total Direct Expenses—"Apportioned"	$26,336.46	$26,379.87	$52,716.33
Total Direct Expenses "Actual" & "Apportioned"	$77,147.54	$56,128.44	$133,275.98
Direct Expenses in Excess of Revenues	$48,653.09	$31,902.69	$80,555.78

Trains did not operate March 21 to April 24, 1948, account O. D. T. Order No. 69.

[fol. 29]

Exhibit "D" to Supplemental Petition

Southern Railway Company

Operating Results of Passenger Trains Nos. 11 and 16 between Birmingham, Ala., to Columbus, Miss. for the period from March 1, 1949 to September 30, 1949

	Train No. 11	Total 8 Months Train No. 16	Total
Revenues			
Passenger	$8,557.79	$7,648.03	$16,205.82
Mail	6,906.32	4,930.70	11,837.02
Express	773.89	1,110.00	1,883.89
Milk and Newspapers	34.77	10.46	45.23
Total	$16,272.77	$13,699.19	$29,971.96
Direct Expenses—"Actual"			
Wages, Train and Engine Crews	$12,421.35	$12,421.33	$24,842.68
Payroll Tax—R. R. Retirement & Unemp. Ins.	687.13	687.16	1,374.29
Train Fuel	7,944.72	7,941.54	15,886.26
Injuries to Persons	12,785.85	.....	12,785.85
Damage to Property	5.00	.....	5.00
Total Direct Expenses—"Actual"	$33,844.05	$21,050.03	$54,894.08
Direct Expenses—"Apportioned"			
Enginehouse Expenses	$1,773.70	$1,773.71	$3,547.41
Pass. Locomotives—Water	332.70	333.45	666.15
Pass. Locomotives—Lubricants	565.99	567.28	1,133.27
Pass. Locomotives—Other Supplies	261.69	262.28	523.97
Pass. Locomotives—Repairs—Steam	8,546.92	8,514.90	17,061.82
Pass. Train Cars—C. H. L. W. & Icing	1,053.47	1,055.00	2,108.47
Pass. Train Cars—Lubricants	96.44	96.37	192.81
Pass. Train Cars—Other Expenses	100.83	100.80	201.63
Pass. Train Cars—Repairs	2,134.51	2,142.11	4,276.62
Pass. Train Cars—Air Conditioning	282.69	279.32	562.01
Pass. Train Cars—Repairs to Motor Car and Trailer	1,344.65	1,334.03	2,678.68
Terminal Station Expenses—Birmingham, Ala.	2,732.86	2,732.86	5,465.72
Total Direct Expenses—"Apportioned"	$19,226.45	$19,192.11	$38,418.56
Total Direct Expenses "Actual" & "Apportioned"	$53,070.50	$40,242.14	$93,312.64
Direct Expenses in Excess of Revenues	$36,797.73	$26,542.95	$63,340.68

[fol. 30] EXHIBIT 4 TO COMPLAINT

Copy

STATE OF ALABAMA, ALABAMA PUBLIC SERVICE COMMISSION,
MONTGOMERY 1, ALABAMA

October 26, 1949.

Lamar Wiley, Secretary.

Gordon Persons, President; Jimmy Hitchcock, Associate Commissioner; C. C. (Jack) Owen, Associate Commissioner.

To All Railroads:

Re: I. C. C. Order 843

This Commission is receiving telegrams and letters notifying us as to compliance with the above order, same being in connection with the discontinuance of passenger trains.

The Public Service Commission is expecting that each and every train which might have been removed in compliance with the I. C. C. order will be restored to service within 24 hours after the I. C. C. order might be rescinded.

Very truly yours, (S.) Gordon Persons, President.

[fol. 31] EXHIBIT 5 TO COMPLAINT

Title 49—Transportation and Railroads
Chapter I—Interstate Commerce Commission
Subchapter A—General Rules and Regulations

Part 95—Car Service

Service Order No. 843-A

(Vacates Service Order No. 843)

Restrictions on Coal-Burning Passenger Service Locomotive Mileage

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 14th day of November, A. D. 1949.

Upon further consideration of Service Order No. 843 (14 F. R. 6517) and good cause appearing therefor:

It is ordered, That:

§ 95.843 Service Order No. 843, *Restrictions on Coal-burning Passenger Service Locomotive Mileage*, be and it is hereby, vacated and set aside.

It is further ordered, That this order shall become effective at 11:59 p. m., November 20, 1949; that a copy of this order and direction be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register.

(40 Stat. 101, Sec. 402; 41 Stat. 476, Sec. 4; 54 Stat. 901; 49 U. S. C. 1 (10)-(17)).

By the Commission, division 3.

W. P. Bartel, Secretary, (Seal).

[fol. 32] November 15, 1949

638-2-843

Supplement No. 1 to Circular CSD-434

To All Railroads:

Herewith I. C. C. Service Order No. 843-A which vacates and sets aside Service Order No. 843, effective 11:59 P. M., November 20, 1949.

Service Order 843, effective October 25, 1949, required any common carrier by railroad operating coal-burning steam locomotives and having 25 or less days supply of fuel coal, and not having available a dependable source of supply of coal, to reduce its coal-burning passenger locomotive miles 25 per cent under the mileage operated on October 1, 1949.

Yours very truly, A. H. Gass.

Lists: CS1, 1A, 1B, DM, CSA.

[fol. 33] EXHIBIT 6 TO COMPLAINT

Copy

RA771 NSA547 NS.MYA758 Long PD—Montgomery, Ala. 21 51OP—1949 Nov. 21 P.M. 6:56

R. K. McClain, Asst Vice Pres.

Report Dly Southern Railway System Wash., D. C.

On October 23, 1949 you wired us as follows:

"In compliance with Service Order No. 843, entitled Restrictions on Coal-burning Passenger Service Locomotive Mileage—entered by Division 3 of Interstate Commerce Commission on October 21st, and served upon Railroads and Regulatory Commissions, to meet the present coal shortage emergency, Southern Railway System Lines will, effective 11:59 P. M., October 25th discontinue operation of the following passenger trains: 1-2 Sheffield-Parrish, 7-8 Sheffield-Chattanooga, 15-16 Wilton-Selma 11-16 Birmingham-Columbus. (Signed) R. K. McClain, Assistant Vice-President, Southern Railway System".

On October 26 you were advised "The Public Service Commission is expecting that each and every train which might have been removed in compliance with the ICC order will be restored to service within 24 hours after the ICC order might be rescinded."

On November 17th we wired you as follows: "Please advise this Commission by return wire if your railroad will definitely restore all passenger trains which were removed in accordance with the emergency order of interstate Commerce Commission in connection with recent coal strike. We have previously notified you that this Commission expects all discontinued trains to be fully restored and [fol. 34] in normal operation 24 hours after the lifting of the ICC order which takes effect midnight November 20."

On November 18th you wired us as follows: "Operation Trains 1-2 Sheffield-Parrish. 7-8 Sheffield Chattanooga and 15-16 Wilton-Selma, suspended under ICC order 483, will be restored November 21st. (Signed) R. K. McClain, Assistant vice President Southern Railway System."

It is noted in your telegram of November 18th that no reference is made to the contemplated restoration of service

of trains 11 and 16 between Birmingham and Alabama-Mississippi state line.

Will you please, therefore, wire us at once if the Southern Railway intends to immediately restore these two trains and if not, kindly supply us with your authority for failing to restore them.

Alabama Public Service Commission by Gordon Persons, President.

[fol. 35] EXHIBIT "6"

Copy

Western Union

Day Letter

Washington, Nov. 22, 1949.

Alabama Public Service Commission
Honorable Gordon Persons, President
Montgomery, Alabama.

Your wire received stop As you see we restored to service yesterday all of the eight trains discontinued under ICC service order 843 with the exception of trains Nos. 11 and 16 between Birmingham and Columbus Mississippi stop As your records will show we have had pending with you since November 10 a supplemental petition asking your authority to keep said two trains out of service stop We requested that the supplemental petition be set down for hearing while the ICC service order which was lifted at midnight on the twentieth was still in effect but you have set it down for hearing along with the original petition for December 8 stop The management is advised that if it restores the trains to service it will thereby waive its supplemental petition which under all the circumstances it cannot see its way clear to do particularly as the direct expenses alone of the operation of these two trains for the last 7 full months of operation exceeded the revenues which they earned by more than nine thousand dollars per month as shown by the supplemental petition. This is an unnecessary and wasteful burden which we should not in all good conscience be asked to resume stop With these two trains

off the company has in service daily between Birmingham and Columbus mixed trains numbers 15 and 12 carrying a standard seventy foot passenger car partitioned for white and colored passengers with separate toilets for men and women in each end of the car and also a standard combination mail express and baggage car with a railroad post office in charge of a RPO clerk in one end of it the rest of the car being used for storage mail express and baggage if any with an express messenger in charge stop The trains operate on convenient schedules stop Number 15 leaves Birmingham at seven fifteen A M arriving Columbus Mississippi at one fifteen P M stop Number 12 leaves Columbus Mississippi one thirty P M arriving Birmingham Alabama seven thirty P M stop These trains run well on time make all stops do very little switching and coupled with improved parallelling highway facilities for buses and private automobiles render adequate service we think to the territory served between Birmingham and Columbus stop With all due regard for the Commission it is not our intention to restore the operation of trains 11 and 16 until we are afforded a hearing and decision on our supplemental petition for authority to keep them out of service stop Please be assured that our position is in no sense arbitrary or [fol. 36] defiant but is we believe the only sound one we can properly take stop We hope on further consideration the Commission will see the correctness of our position and refrain from issuing a citation against us until we can have a hearing and a decision in orderly course on our supplemental petition stop We feel deeply that we are entitled to the sympathetic cooperation of the Commission in our effort to avoid the dissipation of our resources in the operation of local passenger trains at such tremendous and intolerable losses stop

Southern Railway Company, R. K. McClain, Assistant Vice President.

[fol. 37] EXHIBIT 7 TO COMPLAINT

State of Alabama

Alabama Public Service Commission

Montgomery 1, Alabama

Gordon Persons, President Lamar Wiley, Secretary
Jimmy Hitchcock, Associate Commissioner
C. C. (Jack) Owen, Associate Commissioner.

Southern Railway Company, a corporation, Respondent

Citation: to respondent, Southern Railway Company, a corporation, to show cause, if any, why the Commission should not enter of record an order specifying that the failure or refusal of respondent to restore on and after November 22, 1949, the operation of its passenger trains Nos. 11 and 16 between Birmingham, Alabama, and the Alabama-Mississippi state line, constitutes a violation of the provisions of Title 48 of the Code of Alabama of 1940, and requiring that such violation be discontinued by restoration by respondent of the operations of said trains between Birmingham, Alabama, and the Alabama-Mississippi state line.

Docket 12225

On and prior to October 25, 1949, Southern Railway Company, respondent in this proceeding, operated, under regular schedules, its passenger trains Nos. 11 and 16 between Birmingham, Alabama, and Columbus, Mississippi.

Under and by authority of the provisions of Service Order No. 843, dated October 21, 1949, of the Interstate Commerce Commission, which Service Order became effective at 11:59 p. m. on October 25, 1949, the respondent, Southern Railway Company, suspended the operation of the aforesaid two trains between the said points.

Thereafter, the Interstate Commerce Commission by its order terminated or suspended the effective period of its aforesaid Service Order No. 843, and said Service Order No. 843 is not now in effect.

It appears to the Commission that upon the termination or suspension of the effective period of said Service Order No. 843 it was, is and will be the legal duty of respondent under the provisions of Title 48 of the Code of Alabama of 1940 to restore and resume the operation of such two trains between Birmingham, Alabama, and the Alabama-Mississippi state line, and the respondent was advised by the Commission prior to the termination of the effective period of said Service Order No. 843, that respondent should restore such service not later than 24 hours after the termination or suspension of the effective period of said Service Order No. 843.

The Commission is informed that respondent has not restored and resumed the operation of said passenger trains between Birmingham, Alabama, and the Alabama-Mississippi state line within the said specified period of 24 hours after the termination or suspension of the effective period of said Service Order No. 843, and the Commission is further informed by respondent, through its authorized attorney and representative, that respondent does not intend to restore and resume operation of said two trains between Birmingham, Alabama, and the Alabama-Mississippi state line.

Now, Therefore, the premises considered,

It Is Ordered by the Commission that respondent, Southern Railway Company, a corporation, by and through its authorized agent or agents, officer or officers, or employee or employees, be and appear before the Commission at its offices in Montgomery, Alabama, at 2:00 p. m., on Friday, November 25, 1949, then and there to show cause, if any, [fol. 38] why this Commission should not enter of record an Order specifying that the failure or refusal of respondent, Southern Railway Company, a corporation, to restore and resume on and after November 22, 1949, the operation of its passenger trains Nos. 11 and 16 between Birmingham, Alabama, and the Alabama-Mississippi state line, constitutes a violation of the provisions of Title 48 of the Code of Alabama of 1940, and requiring that such violation be discontinued by restoration by respondent of the operations of said two trains between Birmingham, Alabama, and the Alabama-Mississippi state line.

Done at the offices of the Commission in Montgomery, Alabama, on this the 22nd day of November, 1949.

Alabama Public Service Commission. (S.) Gordon Persons, President; Jimmy Hitchcock, Associate Commissioner; C. C. (Jack) Owen, Associate Commissioner.

Attest: A True Copy. (S.) Lamar Wiley, Secretary.

[fol. 39] EXHIBIT 8 TO COMPLAINT

State of Alabama

Alabama Public Service Commission

Montgomery 1, Alabama

Gordon Persons, President.
Jimmy Hitchcock, Associate Commissioner.
C. C. (Jack) Owen, Associate Commissioner.
Lamar Wiley, Secretary.

SOUTHERN RAILWAY COMPANY, a Corporation, Respondent

Docket No. 12225

Order of the Commission

On November 22, 1949, the Commission issued its citation order to Respondent Southern Railway Company, a corporation, to appear before the Commission at its offices in Montgomery, Alabama, at 2:00 P. M., on Friday, November 25, 1949, then and there to show cause, if any there be, why this Commission should not enter of record an order specifying that the failure or refusal of respondent Southern Railway Company, a corporation, to restore and resume on and after November 22, 1949, the operation of its passenger Trains Nos. 11 and 16 between Birmingham, Alabama, and the Alabama Mississippi state line constitutes a violation of the provisions of Title 48 of the Code of Alabama 1940, and requiring that such violation be discontinued by restoration by the respondent of the operation of said two trains between Birmingham, Alabama and the Alabama-Mississippi State Line.

Pursuant to said citation the respondent Southern Railway Company, a corporation, appeared at the time and place ordered and upon the hearing the following facts were established without conflict:

On and prior to October 25, 1949, the Southern Railway Company operated on a regular schedule its passenger Trains Nos. 11 and 16 between Birmingham, Alabama, and Columbus, Mississippi. On September 13, 1948 the Southern Railway Company had filed with this Commission its petition for authority to discontinue its said two passenger Trains Nos. 11 and 16 operating between Birmingham, Alabama and Columbus, Mississippi. On November 14, 1949, Southern Railway Company filed with this Commission a petition supplemental to its said original petition filed on September 13, 1948. On November 16, 1949, this Commission set for hearing in Fayette, Alabama, commencing on December 8, 1949, both said original petition for authority to discontinue said passenger trains and said supplemental petition for authority to not restore the operation of said two passenger trains. Such hearing has not been held and no official order has been entered by this Commission on the said original petition or said supplemental petition. Nor has this Commission entered any order allowng the [fol. 40] discontinuance of the said passenger trains.

Purporting to act under the authority of an order of the Interstate Commerce Commission, being Service Order No. 843, dated October 21, 1949, and effective at 11:59 P. M. on October 25, 1949, the respondent Southern Railway Company suspended operation of the aforesaid two trains between the said points on the effective date of said order.

The Interstate Commerce Commission by its Order No. 843 A, effective as of 11:59 P. M. November 20, 1949, terminated the effective operation of its Service Order No. 843, and since the effective date of Order No. 843 A, said Service Order No. 843 has not been in effect.

Prior to the termination of the effective period of the aforesaid Service Order No. 843 of the Interstate Commerce Commission, this Commission had notified the respondent Southern Railway Company, along with every other railroad company operating in the State of Alabama, that each and every train which might have been removed under the authority of said Service Order No. 843 should be restored to service within twenty-four (24) hours after said order

might be terminated, such notice having been mailed on October 26, 1949 "to all railroads." Also, prior to the termination of the effective period of the aforesaid Service Order No. 843 of the Interstate Commerce Commission, as has already been recited, this Commission had on November 16, 1949, ordered a public hearing of the original petition of Southern Railway Company for authority to discontinue its said two passenger trains and of its supplemental petition for authority to not restore the operation of said two trains, and notice of said hearing had been issued to Southern Railway Company and to all interested parties, said petitions being set for hearing in Fayette, Alabama, at the Fayette County Court House, commencing at 9:00 A. M. on Thursday, December 8, 1949, said petitions and all proceedings thereon being shown under Docket No. 12221 of this Commission.

The records of the Commission show that every other railroad company operating in Alabama promptly reinstated every other train removed under the authority of the said Order of the Interstate Commerce Commission. This Commission is of the opinion that within twenty-four hours after the said Order No. 843 of the Interstate Commerce Commission was terminated by Order No. 843 A of the said Interstate Commerce Commission, i.e., within twenty-four hours after 11:59 P. M. on November 20, 1949, the operation of passenger trains Nos. 11 and 16 between Birmingham, Alabama and the Alabama-Mississippi state line should have been restored. Nevertheless, the respondent Southern Railway Company has not restored and resumed the operation of said two passenger trains between Birmingham, Alabama, and the Alabama-Mississippi state line, and the Commission is informed by the respondent that it does not intend to restore and resume the operation of said two trains between Birmingham, Alabama, and the Alabama-Mississippi state line. Since 12:01 A. M. November 22, 1949, the discontinuance of the operation of said two passenger trains has been without the authority [fol. 41] of this Commission or of the Interstate Commerce Commission and without legal authority of any kind, and in defiance of the direction of this Commission.

It is clearly provided by the statutes of this State (Code of Alabama 1940, Title 48, Section 106; see also Section 35) that "No transportation company * * * shall aban-

don all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public * * * unless and until there shall first have been filed an application for a permit to abandon the service and obtained from the Commission a permit allowing such abandonment." It is obvious that the respondent Southern Railway Company has taken the law into its own hands and is acting in violation of the statutes of Alabama and in defiance of this Commission's authority.

Now, therefore, the premises considered, it is ordered by the Commission that it is hereby found and specified, that the failure or refusal of the respondent Southern Railway Company, a corporation, to restore and resume on and after 12:01 A. M., November 22, 1949, the operation of its passenger Trains Nos. 11 and 16 between Birmingham, Alabama and the Alabama-Mississippi state line, constitutes a violation of the provisions of Title 48 of the Code of Alabama 1940.

It is further ordered by the Commission that the respondent Southern Railway Company shall immediately discontinue the violation of said law by restoring the operation of its said two trains between Birmingham, Alabama and the Alabama-Mississippi state line.

It is further ordered by the Commission that the attention of the respondent Southern Railway Company be directed to Section 399 of Title 48 of the 1940 Code of Alabama, which provides in part that any utility doing business in this State which knowingly or willfully violates any lawful order of this Commission shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than $1,000.00 for each offense, and that in the case of a violation of this Commission's orders each day's violation shall be deemed to be a separate offense.

It is further ordered that the attention of the respondent Southern Railway Company be directed to its petitions before this Commission under Docket 12221 and to the setting of said petitions for hearing at Fayette, Alabama commencing at 9:00 A. M. on Thursday, December 8, 1949, and to the further fact that unless the said respondent Southern Railway Company purges itself of its aforesaid contempt of this Commission on or before the time set for the commencement of such hearing, it will be optional with

this Commission to proceed with said hearing or to postpone the same until the said respondent Southern Railway Company shall have purged itself of its aforesajd contempt [fol. 42] of this Commission's orders and authority in the premises.

Done at the offices of the Commission in Montgomery, Alabama on this the 5th day of December, 1949.

Alabama Public Service Commission. (S.) Gordon Persons, President. Jimmy Hitchcock, Associate Commissioner. C. C. (Jack) Owen, Associate Commissioner.

Attest: A True Copy. (S.) Lamar Wiley, Secretary.

[fol. 43]

EXHIBIT 9 TO COMPLAINT

Table 3B

Birmingham and Columbus

(Birmingham Division)

Read Down		Miles	Central Time			Read Up	
15	11					16	12
A.M.	P.M.					A.M.	P.M.
*7 15	4 00	0	Lv Birmingham	Ala.	Ar	10 30	*7 30
7 30	4 10	2.2	N. Birmingham	"		10 15	7 15
f7 48	f4 26	8.3	Coalburg	"		f10 02	f6 49
f8 04	f4 40	13.2	Brookside	"		f9 49	f6 36
f8 10	f4 45	14.7	Jefferson	"		f9 44	f6 31
f8 25	f4 57	20.2	Littleton	"		f9 33	f6 16
f8 40	f5 12	26.4	Burnwell	"		f9 21	f5 57
9 03	5 32	34.0	Cordova	"		9 03	5 32
f9 15	f5 40	38.5	America Jct.	"		f8 55	f5 20
9 30	5 45	40.6	Parrish	"		8 50	5 05
f9 50	f6 04	47.3	Oakman	"		f8 24	f4 44
f10 10	f6 17	53.5	Corona	"		f8 13	f4 30
f10 38	f6 40	63.9	Berry	"		f7 53	f4 05
f10 50	f6 50	69.1	Bankston	"		f7 45	f3 52
11 16	7 08	79.7	Fayette	"		7 25	3 20
f11 35	f7 23	83.6	Covin	"		f7 14	f3 09
f11 57	f7 39	93.0	Kennedy	"		f7 00	f2 48
f12 10	f7 50	98.9	Millport	"		f6 50	f2 34
f12 20	f7 59	103.0	Fernbank	"		f6 42	f2 25
f12 43	f8 17	113.1	Steens	Miss.		f6 23	f2 04
*1 15	8 45	122.1	Ar Columbus	"	Lv	6 00	*1 30
P.M.	P.M.					A.M.	P.M.

Republic, Bivens, Cardiff, Lynn Crossing, Bibby, Bryan, Doliska, Red Star, Barney, Big Ridge, Gayosa, Dixie Spring, Marietta, Alta, Patton, Rossland City, Stough, Belk and Melbourne are flag stops for Nos. 11, 12, 15 and 16.
f—Flag stop. *—Mixed t ains.

[fol. 44]

EXHIBIT 10 TO COMPLAINT

Alabama Public Service Commission

Docket No. .....

Witness: George V. Bayliss

Exhibit No. .....

Comparison of Motor Vehicle Registrations in the Counties of Jefferson, Walker, Fayette and Lamar and State of Alabama for the License Years 1939 and 1948

Authority: Department of Revenue, State of Alabama, Montgomery, Alabama

Jefferson County

	Pass. Autos.	Trucks	Buses
1948	65,822	15,706	669
1939	51,263	8,164	169
Increase	14,559	7,542	500
Percent	28.4%	92.3%	295.8%

Walker County

	Pass. Autos.	Trucks	Buses
1948	7,058	2,872	38
1939	4,850	1,050	14
Increase	2,208	1,822	24
Percent	45.5%	183.0%	171.4%

Fayette County

	Pass. Autos.	Trucks	Buses
1948	2,281	1,035	3
1939	1,566	500	0
Increase	715	535	3
Percent	45%	107%	300%

[fol. 45]

Lamar County

	Pass. Autos.	Trucks	Buses
1948	1,570	723	0
1939	1,268	396	0
Increase	302	327	0
Percent	23.8%	82.5%	0

State of Alabama

	Pass. Autos.	Trucks	Buses
1948	361,597	124,931	2,101
1939	250,261	54,947	511
Increase	111,336	69,984	1,590
Percent	44.4%	127.3%	311%

[fol. 46]

EXHIBIT 11 TO COMPLAINT

Alabama Public Service Commission

Docket No. .....

Witness: George V. Bayliss

Exhibit No. .....

Ratio of Persons Eighteen Years of Age and Over Per Registered Automobile in the State of Alabama, by Five-year Periods, 1910–1945, Inclusive

Authority: Highway Statistics, Summary to 1945, Public Roads Administration, U. S. Department of Commerce, Washington, D. C.

State of Alabama

Year	Ratio of Persons 18 Yrs. of Age and Over Per Registered Automobile
1910	663.5
1915	119.1
1920	20.8
1925	8.2
1930	6.4
1935	7.9
1940	6.4
1945	6.0

[fol. 47] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS

You are hereby summoned and required to serve upon J. T. Stokely, plaintiff's attorney, whose address is 1038 Brown Marx Building, Birmingham, Alabama, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated Dec. 6, 1949.

O. D. Street, Jr., Clerk of the Court. (Seal)

[fol. 48] Received this writ at Montgomery, Alabama on December 6, 1949. Executed by serving copies thereof with complaints attached on the following:

A. A. Carmichael, Attorney General of the State of Alabama at 5:05 P. M. State Judicial Building, Montgomery, Alabama, December 6, 1949.

Alabama Public Service Commission by leaving copies with Gordon Persons, its president at 523 Dexter Ave., Montgomery, Alabama at 8:00 A. M., December 7, 1949.

Gordon Persons, Alabama Public Service Commissioner at 523 Dexter Av-., Montgomery, Alabama at 8:00 A. M., December 7, 1949.

Jimmy Hitchcock, Associate Commissioner by leaving copies with Gordon Persons, Alabama Public Service Commissioner at 523 Dexter Ave., Montgomery, Alabama at 8:00 A. M. December 7, 1949.

C. C. (Jack) Owen, Associate Commissioner by leaving copies with Gordon Persons, Alabama Public Service Commissioner at 523 Dexter Ave., Montgomery, Alabama at 8:00 A. M. December 7, 1949.

Benjamin F. Ellis, United States Marshal, Middle District of Alabama, by Jack S. Johnson, Deputy.

Fees $10.00.

Returned and Filed Dec. 8, 1949. O. D. Street, Jr., Clerk.

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed December 6, 1949

This cause came on to be heard on the verified complaint herein, and it appearing to the court that defendants are about to commit the acts hereinafter referred to and that they will do so unless restrained by order of this court, and that immediate and irreparable injury, loss and damage will result to plaintiff before notice can be served and a hearing had on plaintiff's application for a temporary restraining order, in that if plaintiff fails to restore the operation of said trains, Nos. 11 and 16, as required by said order of the defendant commission dated December 5, 1949, described in the complaint, and made "Exhibit No. 8" thereto the plaintiff will be liable to the severe penalities provided by Title 48 of the Alabama Code, particularly Sections 110, 399, 400 and 405 thereof, which involve penalties or fines ranging from $500 to $2000 per day against plaintiff, for each day said trains Nos. 11 and 16

are not operated. Each of plaintiff's officers, agents and employees concerned will also be subject to arrest and fines up to $1000 per day. If plaintiff restores the operation of said trains Nos. 11 and 16 as required by said order, it will be subject to an operating loss of approximately $300 per day. Such loss would be irreparable as plaintiff would have no means of recovery. The liability for said penalties and fines, if the operation of said trains are not restored, would likewise be irreparable, because when paid they would be impossible of recovery.

It Is Ordered, that defendants, Alabama Public Service Commission, Gordon Persons, its President, and Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the [fol. 50] State of Alabama, their agents, servants, employees and attorneys and all persons in active concert and participation with them be, and they are hereby restrained from pursuing or invoking any of the remedies provided in Title 48 of the 1940 Code of Alabama, particularly Sections 110, 399, 400 and 405, or otherwise, for the purpose of compelling the plaintiff, or its officials to restore and operate its said trains, Nos. 11 and 16, between Birmingham, Alabama and the Mississippi State Line, or as punishment for their failure to restore and operate said trains; provided that plaintiff first gives bond in the sum of $5000.00, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully restrained, such bond to be approved by the Court, or by the Clerk of the Court. Nothing in this order is intended, or shall be construed as prohibiting or interferring in any way with the hearing on plaintiff's original application of September 13, 1949, for authority to discontinue the operation of said trains Nos. 11 and 16 and on plaintiff's supplemental application of November 10, 1949 for authority to keep said trains out of service set for December 8, 1945 at Fayette, Alabama as shown by paragraph 7 of the complaint, or with a decision and order on said application after such hearings.

It Is Further Ordered, that this order expire within ten (10) days after entry unless within such time the order for good cause shown is extended for a like period or unless the defendant consents that it may be extended for a longer period.

It Is Further Ordered, that the plaintiff's application for an interlocutory injunction be set down for hearing on the 15th day of December, 1949 at 10 O'clock A. M. December 15, 1949, at U. S. Court Room, Montgomery, Alabama.

This 6th day of December, 1949, one o'clock P. M.

C. B. Kennamer, Judge, U. S. District Court.

[File endorsement omitted.]

[fol. 51] Received this writ at Montgomery, Alabama on December 6, 1949. Executed by serving copies thereof on the following:

A. A. Carmichael, Attorney General of the State of Alabama, State Judicial Building, Montgomery, Alabama, at 5:05 P. M. December 6, 1949.

Alabama Public Service Commission by leaving a copy thereof with Gordon Persons, its President at 523 Dexter Ave., Montgomery, at 8:00 A. M. December 7, 1949.

Gordon Persons, Alabama Public Service Commissioner at 523 Dexter Ave., Montgomery, Alabama at 8:00 A. M. December 7, 1949.

Jimmy Hitchcock, Associate Commissioner by leaving a copy thereof with Gordon Persons, Alabama Public Service Commissioner at 523 Dexter Ave., Montgomery, Alabama at 8:00 A. M. December 7, 1949.

C. C. (Jack) Owen, Associate Commissioner by leaving a copy thereof with Gordon Persons, Alabama Public Service Commissioner at 523 Dexter Ave., Montgomery, Alabama at 8:00 A. M., December 7, 1949.

Benjamin F. Ellis, United States Marshal, Middle District of Alabama, by Jack S. Johnson, Deputy.

Fees $10.00.

Returned and Filed December 8, 1949. O. D. Street, Jr., Clerk.

[fol. 52] In the United States District Court

[Title omitted]

Designation of Three-Judge Court—Filed December 13, 1949

The Honorable C. B. Kennamer, United States District Judge for the Middle District of Alabama, to whom an ap-

plication for injunction and other relief has been presented in the above styled and numbered cause, having notified me that the action is one required by act of Congress to be heard and determined by a district court of three judges, I hereby designate the Honorable Leon McCord, United States Circuit Judge, and the Honorable John McDuffie, United States District Judge for the Southern District of Alabama, to serve with Judge Kennamer as members of, and with him to constitute, the said court to hear and determine the action.

Witness my hand this 9th day of December, 1949.

J. C. Hutcheson, Jr., Chief Judge, Fifth Circuit.

(Injunctions—Three Judge Courts—Designation, 28 USCA, Sec. 2284)

[fol. 53] In the United States District Court

[Title omitted]

Motion to Dismiss—Filed December 14, 1949

The defendants move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

2. To dismiss the action because it affirmatively appears that the plaintiff has not exhausted its administrative remedies before the Alabama Public Service Commission.

3. To dismiss the action because the Court judicially knows that Title 48, Sec. 35 of the Code of Alabama 1940 is constitutional and valid.

4. To dismiss the action because the Court judicially knows that Title 48, Section 106 of the Code of Alabama 1940 is constitutional and valid.

5. To dismiss the action because it affirmatively appears that the plaintiff, Southern Railway Company, has abandoned the operation of its trains Nos. 11 and 16 between Birmingham, Alabama and the Mississippi-Alabama state line en-route to and from Columbus, Mississippi without ob-

taining from the Alabama Public Service Commission a permit allowing such abandonment in violation of Sections 35 and 106 of Title 48 of the Code of Alabama, 1940.

[fol. 54] 6. To dismiss the action because it affirmatively appears that the plaintiff's failure or refusal to restore the operation of its said two trains between Birmingham, Alabama and the Alabama-Mississippi state line is in violation Sections 35 and 106 of Title 48 of the Code of Alabama of 1940.

7. To dismiss the action because it affirmatively appears that the plaintiff's failure or refusal to restore the operation of its said two trains between Birmingham, Alabama and the Alabama-Mississippi state line is in violation of a lawful order of the Alabama Public Service Commission.

8. To dismiss the action because it affirmatively appears that the plaintiff is knowingly or willfully violating a lawful order of the Alabama Public Service Commission and that each day's continued violation of said Commission's order by the plaintiff constitutes a separate offense or misdemeanor in violation of Section 399 of Title 48 of the Code of Alabama of 1940.

9. To dismiss the action because it affirmatively appears that the only authority under which the plaintiff suspended the operation of said two trains on October 25, 1949 was service order No. 843 of the Interstate Commerce Commission; that the effective period of said Service Order No. 843 was terminated by Order No. 843A of the Interstate Commerce Commission effective as of 11:59 P.M. November 20, 1949; that prior to the termination of the effective period of the aforesaid service Order No. 843 of the Interstate Commerce Commission, the Alabama Public Service Commission had notified the plaintiff Southern Railway Company, along with every other railroad company in the State of Alabama, that each and every train which might have been removed under the authority of said Service Order No. 843 should be restored to service within twenty-four (24) hours after said order might be terminated; that also prior to the termination of the effective period of the aforesaid Service Order No. 843 of the Interstate Commerce Commission, the Alabama Public Service Commission had on November 16, 1948, ordered a public hearing of the

[fol. 55] original petition of Southern Railway Company for authority to discontinue its said two passenger trains and of its supplemental petition for authority to not restore the operation of said two trains, and notice of said hearing had been issued to Southern Railway Company and to all interested parties, said petitions being set for hearing in Fayette, Alabama, at the Fayette County Court House, commencing at 9:00 A.M. on Thursday, December 8, 1949; that notwithstanding the aforesaid facts, the plaintiff has continuously since the termination of the effective period of said Service Order No. 843, failed and refused without any lawful authority to restore the operation of its said two trains between Birmingham, Alabama, and the Alabama-Mississippi state line.

10. To dismiss the action because it affirmatively appears that the plaintiff and its officers, agents and employees, or any of them cannot be subjected to any of the penalties or fines under Title 48, Sections 110, 399, 400, or 405 in any manner except by a trial before a court of competent jurisdiction and observing due process of law.

A. A. Carmichael, Attorney General of Alabama.
Richard T. Rives, Special Counsel. Attorneys for Defendants.

To Honorable J. T. Stokely
1038 Brown-Marx Bldg.
Birmingham, Alabama.

Please take notice that the undersigned will bring the above motion on for hearing before the Court at the United States Court Room in the City of Montgomery, Alabama on the 9th day of January, 1950 at 10:00 A.M. on that date or as soon thereafter as counsel can be heard.

A. A. Carmichael, Richard T. Rives, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 56] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO COMPLAINT—Filed January 12, 1950

Comes Southern Railway Company, plaintiff in this cause and by leave of Court first had and obtained amends its complaint filed herein on December 6, 1949 by adding thereto the following numbered paragraphs and prayer:

19. The hearing on the plaintiff's said original petition for authority to discontinue the operation of said two passenger trains Nos. 11 and 16 between Birmingham, Alabama and Columbus, Mississippi, and on its said supplemental petition for authority to keep said trains out of service after they had been discontinued under said service order 843, issued by Division 3 of the Interstate Commerce Commission on October 21, 1949, was set for December 8, 1949 at Fayette, Alabama, stated in paragraphs 7, 9 and 10 of this complaint. The hearing on said original petition and said supplemental petition was duly held by the defendant Alabama Public Service Commission on that date and after receiving the evidence offered by the plaintiff petitioner in support of the petitions and by protestants in opposition to the petitions the cause was submitted and taken under advisement by defendant Commission for a report and order. Such report [fol. 57] and order denying said petitions was entered by the defendant Commission on the 9th day of January, 1950.

20. Plaintiff avers that said order of the defendant Commission of January 9, 1950 denying plaintiff's said two petitions takes the plaintiff's property for public use without just compensation, denies to plaintiff due process of law, denies to plaintiff the equal protection of the law, and unduly burdens interstate commerce, all in violation of the Constitution of the State of Alabama and of the Fifth and Fourteenth Amendments to and the Commerce Clause of the Constitution of the United States and should be held unlawful, null and void and of no effect.

Wherefore, Plaintiff prays supplemental to the prayer of its original complaint herein that an interlocutory injunction pending the final disposition of this cause be issued enjoining defendants, their agents, servants, employees and attorneys, and all persons in active concert and participa-

tion with them jointly and severally from proceeding against the plaintiff, its officers, agents or employees to enforce any penalties or other remedies provided by the laws of the State of Alabama by reason of plaintiff's or their failure or the failure of any of them to restore the operation of said two passenger trains Nos. 11 and 16 between Birmingham, Alabama and the Mississippi State Line as required by said order of defendant Alabama Public Service Commission of December 5, 1949 and as is inherent in said order of Jan-
[fol. 58] uary 9, 1950, and that on the final hearing of this cause that each of said orders be held unlawful, null and void and of no effect, and that such interlocutory injunction be made permanent.

Marion Rushton, 1203 Bell Building, Mongomery, Alabama, Rushton, Stakely & Johnston, (Montgomery, Alabama). (S.) J. T. Stokely, 1038 Brown-Marx Bldg., Birmingham, Alabama, Benners, Burr, Stokely & McKamy, (Birmingham, Alabama). Of Counsel. (S.) Charles Clark, Southern Railway Bldg., Washington, D. C., Attorneys for Plaintiff, Southern Railway Company.

Filed by leave of Court Jan. 12, 1950. O. D. Street, Jr., Clerk.

[fol. 59] In United States District Court

[Title omitted]

Amendment to Motion to Dismiss—Filed January 12, 1950

The defendants refile to the complaint as amended the motion to dismiss and each ground thereof heretofore filed to the original complaint, and in addition thereto defendants move the Court as follows:

11. To dismiss the action because its seeks a*m* injunction to stay proceedings in a State Court in a cause not expressly authorized by an Act of Congress and not necessary in aid to the jurisdiction of this Honorable Court, or to protect or effectuate its judgments.

12. To dismiss the action because a Court of Equity should not restrain criminal prosecutions in a state court.

13. To dismiss the action because there is no equity in the complaint.

A. A. Carmichael, Attorney General of the State of Alabama. Richard T. Rives, Special Counsel, Attorneys for Defendants.

Filed in open Court after amendment was allowed by Court, Jan. 12, 1950. O. D. Street, Jr., Clerk.

[fol. 60] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO STAY ACTION—Filed January 12, 1950

Without waiving the motion to dismiss this action as amended or any ground thereof, the defendants further show unto the Court that this Honorable Court is asked in the complaint to decide an issue of the constitutionality of Title 48, Section 35 and Section 106 of the Code of Alabama 1940 upon the ground that said statutes are unconstitutional and void as an unlawful delegation of legislative power, and is asked to decide other questions of law and of fact the proper decision of which should be made in the State Courts of Alabama, and that the decision of the Supreme Court of Alabama upon the constitutionality under the state constitution of the statutes of Alabama and upon the construction of such statutes would be final, binding and conclusive upon all other courts, and that this Honorable Court should not undertake a decision on such questions of law or of fact until [fol. 61] the same can be decided in State courts; that the plaintiff's two passenger trains referred to in the complaint are not now in operation and that the plaintiff is suffering no damage, irreparable or otherwise, at this time; that the plaintiff has a right to appeal from the orders of the Commission complained of in the complaint to the Circuit Court of Montgomery County, Alabama, in Equity and thence to the Supreme Court of Alabama, and that the said Circuit Court, or the Judge thereof, upon hearing and notice, after consideration of the testimony taken before the Commission, may direct that such appeal shall stay or supersede the order or action appealed from.

Wherefore, the defendants move this Honorable Court to stay any further actions, orders or decrees in this complaint pending the determination in the Courts of the State of Alabama of the appeals which may be taken by the plaintiff from the orders or decrees of the Alabama Public Service Commission complained of in the complaint.

A. A. Carmichael, Attorney General of the State of Alabama. Richard T. Rives, Special Counsel. Attorneys for Defendants.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO COMPLAINT—Filed January 12, 1950

Come the defendants, jointly, severally and separately, and without waiving the motion to dismiss the complaint or any ground of said motion, do expressly insist thereon, nevertheless for answer to the complaint plead and say:

1. They admit the allegations of paragraph one of the complaint.

2. They admit the allegations of Paragraph two of the complaint.

3. They admit that this suit is of a civil nature between citizens of different states and that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00. They deny that this suit arises under the Fourteenth Amendment to the Constitution of the United States.

4. They admit that by Title 48, Section 35 and Section 106 of the Code of Alabama of 1940, plaintiff and other common carriers by railroad are required to file an application with the Alabama Public Service Commission for a permit to abandon all or any portion of its service to the public or the operation of any of its lines, property or plant which would affect the service it is rendering to the public, with certain exceptions not here pertinent, and is further required to obtain from the Commission a permit allowing such abandonment before it can lawfully abandon

operation of passenger trains or any other service it is rendering to the public on its lines of railroad in Alabama. They deny that no standards for the guidance of the Commission are prescribed, and they aver that standards of present and future public convenience and necessity are [fol. 63] prescribed, and that such standards are as definite as are practicable and as the circumstances require or permit. They deny that the said statutes, or either of them, are unconstitutional and void as an unlawful delegation of legislative power or upon any other ground. They admit that the plaintiff on, to-wit, the 13th day of September, 1948, filed with the Alabama Public Service Commission an application for authority to discontinue the operation of two passenger trains in so far as the same are operated in Alabama as alleged in Paragraph four of the complaint. They deny the averments of fact contained in the said application and repeated therefrom in paragraph four of the complaint.

5. They admit that, purporting to act under the authority of Service Order No. 843 of the Interstate Commerce Commission, the plaintiff, effective at 11:59 P. M., October 25, 1949, discontinued the operation of its said two passenger trains, Nos. 11 and 16 between Birmingham, Alabama and Columbus, Mississippi, and at the same time, purporting to act under the same order, discontinued the operation of its other trains as alleged in paragraph five of the complaint. They aver that the effective period of said Service Order No. 843 was terminated by Order No. 843-A of the Interstate Commerce Commission effective as of 11:39 P. M., November 20, 1949; that prior to such termination of the effective period of the aforesaid Service Order No. 843 of the Interstate Commerce Commission, the Alabama Public Service Commission had notified the plaintiff, along with every other railroad company operating in the State of Alabama, that all trains removed under the authority of said Service Order No. 843 should be restored to service within twenty-four hours after said Order might be terminated. They further aver that also prior to such termination of the effective period of the aforesaid Service Order No. 843 of the Interstate Commerce Commission and on, to-wit, the 16th day of November, 1949, the Alabama Public Service Commission had ordered a public hearing of the original application of plaintiff for authority to

discontinue its said two passenger trains and of its supplemental application for authority to not restore the operation of said two passenger trains, and notice of said [fol. 64] hearing had been issued to the plaintiff and to all interested parties, said applications being set for hearing at the Fayette County Court House in Fayette, Alabama, commencing at 9:00 A. M. on Thursday, December 8, 1949; that, notwithstanding the aforesaid facts, the plaintiff has continuously since the termination of the effective period of said Service Order No. 843, failed and refused, without any lawful authority, and still fails and refuses to restore the operation of its said two passenger trains between Birmingham, Alabama and the Alabama-Mississippi State line.

6. They admit that on the 10th day of November, 1949, the plaintiff filed with the Alabama Public Service Commission its supplementary application for authority to not restore the operation of its said two passenger trains, but they deny the averments of fact contained in said supplementary application and repeated in paragraph six of the complaint.

7. They admit that, due to the crowded condition of the docket of the Alabama Public Service Commission, the application filed by the plaintiff on September 13, 1948, was not promptly heard, but they deny that the plaintiff has requested and urged any special or preferential hearing or has made any repeated offers to have said application set for hearing; to the contrary they aver that the plaintiff made no such offer until on or about October 26, 1949, when by letter dated October 24, 1949, the plaintiff's counsel requested the Commission to set the same for hearing at the earliest consistent date after November 10, 1949. The plaintiff's supplemental application dated November 9, 1949, was filed on November 14, 1949. On November 16, 1949, by due notice to the plaintiff and other interested parties, the application as amended was set for hearing in Fayette, Alabama on December 8, 1949, and was actually heard at said time and place.

8. They admit the averments in paragraph eight of the complaint.

9. They admit the averments of paragraph nine of the complaint, except that they aver that the President of the

Alabama Public Service Commission in a telephone conversation with plaintiff's attorney referred to in said paragraph insisted that the plaintiff's failure or refusal to restore the operation of its said two passenger trains was without lawful authority and that the operation of said two [fol. 65] passenger trains should be restored.

10. They admit the averments of paragraph ten of the complaint.

11. They admit the averments of paragraph eleven of the complaint.

12. They deny the averments of paragraph 12 of the complaint and to the contrary aver that, pursuant to the authority referred to in paragraph eleven of the complaint, the plaintiff and its counsel appeared at the time and place ordered and upon due hearing according to law, the facts set forth in the order of the Alabama Public Service Commission of date December 5, 1949, a copy of which is attached to and made a part of the complaint and identified therein as Exhibit No. 8, were established without conflict.

13. They deny the averments of paragraph thirteen of the complaint and aver that the facts are truly found and reported in the report and order of the Commission dated the 9th day of January 1950, denying the plaintiff's application for authority to discontinue the operation of its said two passenger trains Nos. 11 and 16, between Birmingham, Alabama and Columbus, Mississippi, in so far as the same are operated in Alabama, a copy of which said Order of the Commission is hereto attached and made a part hereof and identified as Exhibit "A."

14. They admit that the plaintiff filed applications for authority to discontinue the operation of other trains as averred in paragraph fourteen of the complaint. They deny the averments of fact contained in said applications and repeated in said paragraph, and they deny that the Commission unduly delayed orders upon said applications, and they deny that the plaintiff has been deprived of its property without due process of law or has been denied the equal protection of the law or that any of its other constitutional rights have been violated. They deny other averments of fact contained in paragraph fourteen of the complaint.

15. They deny the averments of fact and the questions of law and expression of opinion contained in paragraph fifteen of the complaint.

[fol. 66] 16. They deny the facts averred in paragraph sixteen of the complaint. They deny that by the mere failure to restore the operation of its said two passenger trains the plaintiff and its officers, agents and employees will incur liability for penalties and fines as averred in said paragraph sixteen of the complaint, and aver to the contrary that the plaintiff's attention was directed by the Alabama Public Service Commission, in its order dated December 5, 1949, in a case appearing under Docket Number 12,225 on the Docket of said Commission, to Section 399 of Title 48 of the 1940 Code of Alabama, which provides in part that any utility doing business in this State which knowingly and willfully violates any lawful order of said Commission shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than $1000.00 for such offense, and that in the case of the violation of said Commission's order, each day's violation shall be admitted to be a separate offense.

They aver that the law does so provide, and that the plaintiff would incur liability for such fine only upon conviction by a Court of competent jurisdiction of a criminal offense of having knowingly or willfully violated a lawful order of the said Commission.

17. They deny the averments of paragraph seventeen of the complaint and deny that they have made any threats in any way against the plaintiff except simply to direct the attention of the plaintiff to Section 399 of Title 48 of he 1940 Code of Alabama in the said order of the said Commission of date December 5, 1949, as set forth in paragraph sixteen of this answer.

18. They deny the averments of paragraph eighteen of the complaint and aver to the contrary that the plaintiff has a full, adequate and complete remedy for any wrongs done or alleged to have been done by the defendants or any of them as provided by the laws of the State of Alabama, including the right to appeal from any final action or order of the Commission to the Circuit Court of Montgomery County, Alabama sitting in Equity, and thence to the Supreme Court of Alabama, and including further the

right and procedure to supersede any such order or decree [fol. 67] of the Commission so appealed from, and the right to have such order or decree of the Commission set aside if the Court finds that the Commission ordered to the prejudice of the plaintiff substantially in its application of the law, or that the order or decree was based upon a finding of facts contrary to the substantial weight of the evidence.

19. For further answer to paragraph nineteen of the amended complaint the defendants admit the averments of said paragraph nineteen and further show unto the Court that a copy of the report and order denying the plaintiff's applications entered by the defendant Commission on the 9th day of January, 1950, has been hereto attached and made a part of this answer and marked for identification as Exhibit A.

20. The defendants deny the averments of paragraph twenty of the complaint.

And now having fully answered the plaintiff's complaint, the defendants pray that they may be hence discharged with their reasonable costs incurred.

A. A. Carmichael, Attorney General of Alabama;
Richard T. Rives, Special Counsel, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 68] EXHIBIT "A" TO ANSWER

State of Alabama

Alabama Public Service Commission

Montgomery 1, Alabama

Gordon Persons, President.
Jimmy Hitchock, Associate Commissioner.
C. C. (Jack) Owen, Associate Commissioner.
Lamar Wiley, Secretary.

SOUTHERN RAILWAY COMPANY, a Corporation, Petitioner

Petition:

Petition (as amended): (1) For authority to discontinue its passenger trains Nos. 11 a[illegible] 16, between Birmingham,

Alabama, and Columbus, Mississippi, and (2) For authority to not restore the operation of said two trains between said points upon the termination of the present suspension of operation thereof under an order of the Interstate Commerce Commission issued on account of the shortage of coal.

Docket 12221

Submitted: December 8, 1949.
Decided: January 9, 1950.

APPEARANCES:

Charles Clark, J. T. Stokley and W. W. Bankhead, for Petitioner.

Oliver E. Young, Sr., Oliver E. Young, Jr., C. M. Holder, Roger C. Landrum, Laurie C. Battle, C. B. Wilson, J. D. Daniel, Vaughn Sumner, L. S. Ackerman, Charles W. Nolen, W. F. Wilson, J. P. Knight, J. L. Carraway, J. A. Poe, M. H. Johnston, M. S. Black, C. R. Came, D. A. Hutto, Marion Savage, Mr. Lelievre, William Walden, Will Crownover, Mr. Myers and Kelly Savage, for protestants.

Report and Order of the Commission

By petition filed with the Commission on September 13, 1948, the Southern Railway Company requested, for reasons therein stated and others to be later shown, that it be duly authorized and permitted in the manner prescribed by law, to discontinue the operation of its passenger trains Nos. 11 and 16 between Birmingham, Alabama and Columbus, Mississippi, insofar as the same are operated in Alabama.

On October 1, 1948, petitioner filed with the Commission certified proof of posting of notice for the required ten-day period at each station and stopping place for the receipt and discharge of passengers on the line affected, to the effect that the said petition was being filed. This resulted in the Commission receiving written protests from a large number of interested citizens at several points on the line of railroad in question.

Due to the crowded condition of the Commission's formal docket at that time and which became progressively more so [fol. 69] and in view of the petitioner not specifically requesting unusual or preferential attention this matter was

not considered as sufficiently extraordinary to require special or expedited handling.

Nothing further was received from petitioner regarding this matter until October 26, 1949, when by letter dated October 24, 1949, petitioner's division counsel requested the Commission to set same for hearing at the earliest consistent date after November 10, 1949.

It appears that on October 21, 1949, just prior to the date of the above request, the Interstate Commerce Commission entered its Service Order No. 843 directing that, effective at 11:59 p. m., October 25, 1949, any common carrier by railroad operating coal-burning steam locomotives and having 25 or less days supply of fuel coal for such locomotives and not having available a dependable source of supply of coal, shall reduce its coal-burning passenger locomotive miles to an amount of 25% less than it operated such passenger locomotives on October 1, 1949. The preamble of this service order expressed the opinion that due to the insufficient production of bituminous coal an emergency existed requiring immediate action in all sections of the country. By stipulation, the said service order was to continue in effect until 11:59 p. m., December 25, 1949, unless otherwise modified, changed, suspended or annulled by order of the Interstate Commerce Commission.

Pursuant to the above service order, the petitioner in the instant proceeding discontinued its passenger trains Nos. 11 and 16 between Birmingham, Alabama, and Columbus, Mississippi, on October 25, 1949. During this temporary interruption of service, to which this Commission interposed no objection purely because of the gravity of the emergency, the petitioner in this cause amended its original request by supplemental petition dated November 9, 1949, and filed on November 14, 1949, wherein it requested for the reasons therein stated and others to be shown at the hearing, that it not be required to restore the operation of said two interstate passenger trains Nos. 11 and 16 between Birmingham, Alabama, and Columbus, Mississippi, when the coal shortage shall have been relieved and that it be duly authorized by the Commission not to restore the operation of said trains insofar as the same are operated in the State of Alabama.

Accordingly and by due notice dated November 16, 1949, to proper parties, the petition, as amended, was set for

[fol. 70] hearing and heard in Fayette, Alabama, on December 8, 1949.

In the meantime, however, the Interstate Commerce Commission by Service Order No. 843-A entered on November 14, 1949, vacated and set aside its Service Order No. 843 as of 11:59 p. m., November 20, 1949. Regardless of this development petitioner had not resumed the operation of passenger trains Nos. 11 and 16 on December 8, 1949, the date of hearing. Therefore the issue in this proceeding is limited strictly to the matter of permanent discontinuance of such service. Furthermore, on January 4, 1950, the Interstate Commerce Commission entered its Service Order No. 845 effective at 11:59 p. m., January 8, 1950, again directing the railroads to curtail their coal-burning passenger locomotive miles but in this case the amount is by 33⅓ per cent and to expire March 8, 1950. On January 5, 1930 the Commission requested petitioner to advise whether or not the trains involved in this proceeding and not restored at the expiration of Service Order 843 would be embraced in the percentage of curtailment under the new order. Petitioner has advised that it would not.

The operating schedule of trains Nos. 11 and 16 is train No. 11 leaving Birmingham at 4:00 p. m. arriving Columbus, Mississippi at 8:45 p. m. and train No. 16 leaving Columbus at 6:00 a. m. arriving Birmingham at 10:30 a. m. Between these termini petitioner maintains other service by mixed trains Nos. 15 and 12, the schedules being train No. 15 leaving Birmingham at 7:15 a. m. arriving Columbus at 1:15 p. m. and train No. 12 leaving Columbus at 1:30 p. m. arriving Birmingham at 7:30 p. m. Each of the four schedules above call for 4 regular stops and 34 flag stops at intermediate stations. The distance between termini is 122 miles. The scheduled elapsed time of train No. 11 is 4 hours and 45 minutes, train No. 16 is 4 hours and 30 minutes and mixed trains Nos. 15 and 12, which petitioner proposes to retain, is 6 hours.

From the standpoint of convenience and service mixed trains are considerably inferior to the trains Nos. 11 and 16. In the first place the latter represent strictly passenger train service including express, mail and baggage whereas a mixed train generally consists of a series of freight cars with one coach attached and which is divided into three sections, white, colored passenger compartments at each

end and a baggage compartment in between. In this case petitioner's trainmaster testified that presently a combination mail baggage-express car is also used in [fol. 71] mixed trains Nos. 15 and 12 but we presume that this is only a temporary arrangement. Secondly, a mixed train performs freight service enroute by switching and placing freight cars and loading and unloading less carload freight thereby considerably lengthening the fixed schedule and frequently delaying the train beyond such schedule. This type of passenger service is most obnoxious. During the month of November 1949 train No. 15 left Birmingham an average of 8 minutes late on four days and train No. 12 arrived at Birmingham an average of 30 minutes late on twelve days, no similar date was submitted in regard to trains Nos. 11 and 16, but their schedules are no doubt regular. Furthermore, in this particular case, the schedules afforded by the passenger trains Nos. 11 and 16 of arriving at Birmingham, the principal business area and interline connecting point at 10:30 a. m. and departing at 4:00 p. m. are vastly more convenient and desirable than the mixed trains arriving at 7:30 p. m. and departing at 7:15 a. m. From the above it is evident to us that the mixed train service which petitioner will retain is not in any way comparable to that accorded by trains Nos. 11 and 16.

Petitioner has submitted in evidence a detailed description, including photographs, of the consist of trains Nos. 11 and 16 for the purpose of showing the type of equipment ordinarily used on this run. This evidence deals with the operation of a steam locomotive and three cars, the latter consisting of one coach for white passengers, another partitioned coach with colored passengers using the front section and the rear section used as a smoker for white passengers. These cars are of steel construction and air-conditioned except when a "nll-in" is necessary in case of a break-down or an emergency. The other is a combination car with the front section being used for United States mail and the rear section for express and railroad baggage.

During the month of September 1949, the above type of equipment was used on 54 trips, 41 of which were powered by a mountain type locomotive and 13 by a Mikado type. According to our information, those types are identified by wheel arrangement, being 4-8-2(ooOOOOo) and 2-8-2(oOO-OOo) respectively. A qualified witness for petitioner testi-

fied that the mountain type locomotive is used extensively on passenger trains whereas the Mikado type is principally a freight locomotive, nevertheless, both are obviously en- [fol. 72] tirely too heavy and expensive to operate on a passenger train consisting of only three cars.

Petitioner has submitted in evidence operating results of trains Nos. 11 and 16 for the period March 1 to September 30, 1949. According to this tabulation the total revenues, including passenger, mail, express, milk, newspapers, etc., were $29,971.96. The actual expenses, that is those directly incurred by the operation of the trains, are shown as $50,112.95. This includes wages and train fuel of $37,322.10, injuries to persons of $12,785.85 and damage to property of $5.00. In addition the apportioned expenses are shown as $43,161.96 which includes enginehouse expense, locomotive expense, passenger train expense and station expense at Birmingham making a total of $93,274.91. This results in an alleged loss of $63,302.95.

The greatest items of these expenditures are obviously caused by the operation of the heavy steam locomotives and the type of coaches necessary with steam power.

The record shows that on 97 one-way trips during the above period a Diesel unit consisting of a motor car and trailer was used. While no photographs were submitted by petitioner, this is evidently a light, compact and inexpensive unit to operate. According to the record, the cost of repairs per mile for this unit averages 13.7 cents per mile. Petitioner shows the cost of repairs to this unit for the 97 one-way trips during this period to be $2,678.68. Based on 122 miles for each trip, this unit operated 11,834 miles which at 13.7 cents per mile would amount to $1,621.26. Therefore, petitioner's apportioned cost for repairs to motor car and trailer is evidently incorrect by more than $1,000.00.

During the 214 days in the above period 428 one-way trips should have been made. If 97 trips were made by the Diesel Unit, 331 were made by the heavier steam locomotive trains. This would mean a total mileage of 40,382. The record shows the average cost per mile for repairs to steam locomotives to be 42.13 cents per mile resulting in a total cost of $17,012.94 which is approximately the same amount shown on petitioner's statement.

As shown above the estimated per mile cost for repairs to the Diesel Unit is 13.7 cents. If this unit had been oper-

ated during the entire 214 days the cost for repairs for the total of 52,216 miles would have been $7,153.59 resulting in a saving of over $12,500.00 for power unit repairs as- [fol. 73] suming petitioners figure of $2,678.68 for repairs to motor car and trailer to be correct.

In addition a substantial saving would be accomplished in wages for the train and engine crews in that reduced personnel is required on a motor car trailer. Also other items such as fuel, lubricants, etc., in the operation of such a unit could afford a further saving.

While our power to check into the efficient management of a railroad is limited to the matter of rate making we do feel that as to the matter of short line passenger service more economical and equally as effective means could be devised to conveniently handle such traffic and not only hold the present volume but perhaps increase it. The mechanics of operating a railroad is entirely a matter of managerial discretion but it is our opinion that in this case unnecessary expense is involved.

In the 62nd Annual Report of the Interstate Commerce Commission dated November 1, 1948, said at Page 3:

> "While not unmindful of the many efforts which railroads individually and to some extent collectively are making to increase the efficiency of particular operations, and while appreciative of the fact that most railroads face difficulties in securing outside funds with which to effect cost-reducing fixed improvements, we are of the view that much more must be done to increase the efficiency and reduce the costs of railroad operations. * * * Bold experimentation with new devices and methods seems also to be required in some instances."

We feel that in this case no experimentation has been made to increase the efficiency and reduce the costs of railroad operations leave alone "bold experimentation" but that to the contrary a determination has been made by the management to discontinue the service and the more expensive it can be made the easier the result.

As previously stated petitioner submitted in evidence operating results of trains Nos. 11 and 16 which after all furnish the basis for petitioners case. Two statements were submitted, one covering the period March 1, 1948 to Feb-

ruary 28, 1949 and the other March 1, 1949 to September 30, 1949. According to petitioner, during the first period the direct expenses of operating these two trains were $78,372.52 in excess of the revenues and during the second period this difference was $63,302.95. It is interesting to note that the exhibits attached to the supplemental petition filed on November 14, 1949 show operating results for the same periods. According to these exhibits the direct ex- [fol. 74] penses for the first period were $80,555.78 in excess of the revenues and for the second period the difference was $63,340.68. This shows that in submitting two statements for the first period they differed by $2,183.26 and while the two statements for the second period only differed by $37.73 many items of expense fluctuated. The only constant figures were the revenues. In view of this we question if any confidence can be placed in the accuracy of expenses as shown by the statements submitted at the hearing. Nevertheless, if a loss exists in a minute portion of the system as a whole this loss is cushioned to the extent of about 40 per cent representing what the carrier would otherwise be required to pay in taxes were the loss eliminated.

It is noted that in these statements the petitioner has charged train No. 11 with a total of $33,898.36 representing injuries to persons. We do not know if the injuries were caused by negligence of employees or contributory negligence of those injured nevertheless this may be termed as an operating expense. However, because the accidents unfortunately happened in these particular periods we do not feel that this amount should here be charged in whole but averaged over the years the train has been operating. The record shows that based upon petitioner's passenger service casualty expenses in the State of Alabama for the ten year period 1939 to 1948 and prorated on basis of the total passenger train miles in Alabama with the train miles of Nos. 11 and 16 the average for these trains over the above period would amount to $3,526.42 per year.

The area served by these trains, according to petitioner's calculation, has a population of about 10,000. This, of course, only includes the area immediately adjacent to the railroad, however, the outlying districts should also be taken into consideration so it may well be said that 15,000 people are within the area served by these trains. It is

true that bus lines closely parallell the railroad over a portion of the line but a large portion does not have bus service closely available and therefore must depend principally on the railroad. The area traversed by the line is largely inhabited by low income families and it is reasonable to assume that automobiles are not plentiful. No doubt many hundreds depend entirely upon the railroad for their transportation. Passenger traffic itself however, is not the only service upon which these people must depend so vitally [fols. 75-379] but express and mail are of a very important consideration. Even though we have no control over the mail we believe we can give consideration to the inconvenience it might work upon the public when the discontinuance of service might carry with it a loss of adequate mail facilities. We have reason to believe, from the record, that with the discontinuance of trains Nos. 11 and 16 the mail service would not be comparable to that accorded with the trains in service.

The record does not show how long these trains have been operated but we assume for many years. We do not believe that simply because a train service has been maintained for a long period it should be retained after it has served its usefulness but when it is still an essential part of the daily lives of hundreds of people and dozens of towns and communities it is part and parcel of their well being. These people depend upon such service to the extent that its absence would affect the welfare of their communities and instead of an opportunity to grow it would stifle the entire area.

It is our opinion that public convenience and necessity requires the operation of trains Nos. 11 and 16 and that with the exercise of stringent economies and experimentation with new and different devices and methods the petitioner could meet this public need without fear of a burdensome operation.

Upon careful consideration of all the evidence and the facts disclosed thereby we are of the opinion and find that the petition should be denied.

It is therefore ordered by the commission, That the petition of the Southern Railway Company filed on September 13, 1948, requesting authority to discontinue the operation of its passenger trains Nos. 11 and 16 between Birmingham,

Alabama and Columbus, Mississippi, insofar as the same are operated in Alabama, be, and it is hereby denied.

Dated at Montgomery, Alabama, this the 9th day of January 1950.

Alabama Public Service Commission, Gordon Persons, President; Jimmy Hitchcock, Associate to Commissioner. C. C. (Jack) Owen, Associate Commissioner.

Attest. A true copy: Lamar Wiley, Secretary.

[fol. 380] In the District Court of the United States for the Middle District of Alabama, Northern Division

Civil Action No. 645-N

Southern Railway Company, a Corporation, Plaintiff,

vs.

Alabama Public Service Commission, Gordon Persons its President, and Jimmy Hitchcock and C. C. (Jack) Owens, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, Defendants

Before Leon McCord, Circuit Judge, and John McDuffie and Charles B. Kennamer, District Judges

Opinion—Filed February 8, 1950

Kennamer, District Judge:

Statement of the Case

Plaintiff, Southern Railway Company, a corporation, organized and existing under the laws of the State of Virginia, is engaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points in other States throughout the South.

The Defendant Alabama Public Service Commission, is an Administrative body, created under the laws of the State of Alabama, and authorized to exercise certain regulatory powers over the Plaintiff and other common carriers

by railroad within the State of Alabama. (Title 48, Section 1, and Section 106, Code of Alabama, 1940.)

Plaintiff Railway, by complaint as amended, petitions this Court for injunctive relief to enjoin the Defendants, their agents, etc., from proceeding against the Plaintiff, its officers, etc., to enforce any penalties or other remedies provided by the laws of the State of Alabama, by reason of Plaintiff's failure to restore the operation of Trains Nos. 11 and 16, as required by order of the Defendant Commis- [fol. 381] sion of December 5, 1949, and as is inherent in the Commission's report and order of January 9, 1950.

The Defendants filed a motion to dismiss the bill of complaint as amended; a motion to stay the proceedings in this Court; and, without waiving any of these motions or the grounds thereof, an answer to the bill of complaint as amended.

The Court heard this cause, by consent of the parties Plaintiff and Defendants, on the Defendant's motion to dismiss, motion to stay the cause in this Court, and on Plaintiff's application for a temporary and permanent injunction, and on the merits of the bill and answer.

After the Court announced the cause would be so heard, the respective parties offered evidence, and at the conclusion of the taking of the evidence, oral arguments were heard by the Court and permission was given the parties to file written briefs with the Court within fifteen days, and the cause was taken under advisement by the Court.

Questions to be Determined by the Court

The main question raised by the motions to dismiss and stay, is, whether this Court should entertain this action at this time, irrespective of the impact the orders of the Commission had on the Plaintiff, or in spite of their questionable constitutionality.

The main question presented to this Court by the bill and answer is, whether the orders of the Defendant Commission of December 5, 1949 and January 9, 1950, is a violation of due process of law, as provided for by the 14th amendment to the Federal Constitution, and will result in an illegal confiscation of the Plaintiff's property.

Findings of Fact

1. Plaintiff Railway is a foreign corporation, organized and existing under the laws of the State of Virginia, is en-

gaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points in other States throughout the South.

2. The jurisdictional amount of three thousand dollars, exclusive of interest, is involved. The bill of complaint, as [fol. 382] amended, contains allegations of denial of due process of law, as provided for by the 14th amendment to the Federal Constitution. The parties are properly before the Court and this Court has jurisdiction to hear and determine the issues involved. No suit is pending at this time in any of the Courts of the State of Alabama between the parties to this litigation, therefore, the rule of comity is not applicable.

3. Plaintiff Railway did, on September 13, 1948, file an application with the Defendant Commission for authority to discontinue operation in Alabama of Trains Nos. 11 and 16, as required by Sections 35 and 106 of the Code of Alabama, Title 48.

4. Plaintiff Railway did, on October 25, 1949, and in compliance with an order of the Interstate Commerce Commission made to effectuate a saving in the use of coal, discontinue operation of passenger Trains Nos. 11 and 16.

5. Plaintiff Railway did, on November 10, 1949, file a supplemental petition with the Defendant Commission for authority to be relieved of the necessity of restoring to operation Trains 11 and 16 within the State of Alabama.

6. The Interstate Commerce Commission did, on November 14, 1949, issue an order vacating and setting aside the order under which Plaintiff Railway had, on October 25, 1949, discontinued operation of Trains 11 and 16.

7. Plaintiff Railway did, on numerous occasions, after the filing of the original application with the Defendant Commission, and after the filing of the supplemental petition, make requests to the Commission for an opportunity to be heard on the original application and the supplemental petition, but were denied such a hearing by the Commission; the Commission stating that no such hearing would be held until the Trains had first been restored to service.

8. The Defendant Commission did, on December 5, 1949, enter an order requiring the Plaintiff to restore Trains 11

and 16 to service, and calling Plaintiff's attention to certain statutory penalties made and provided for in the event of a refusal.

[fol. 383] 9. Plaintiff Railway did, on December 6, 1949, file in this Court a bill for a temporary restraining order against the enforcement of the order of December 5, 1949, by the Commission. A temporary restraining order was granted by the Judge of this Court and the hearing on the bill for a temporary and permanent injunction was set for hearing before a three Judge Court for December 15, 1949, which hearing, at the request and consent of the Defendants, filed in this Court on December 14, 1949, was passed until the 9th day of January, 1950, and later, at their request and consent, to the 12th day of January, 1950.

10. The Defendant Commission did, on December 8, 1949, hold a hearing at the Court House at Fayette, Alabama, at which time the Plaintiff Railway was given an opportunity and did present evidence and argument in support of the original application and supplemental petition.

11. The Defendant Commission did, on January 9, 1950, make and file a report and order denying the Plaintiff's original application and supplemental petition.

12. The Defendant Commission took no action on the original application, filed by the Plaintiff with the Commission on September 13, 1948, for authority to discontinue operation in Alabama of Trains 11 and 16, from the time the original application was filed until the trains were discontinued by order of the Interstate Commerce Commission on October 25, 1949.

13. That for a period of about fifteen months prior to the filing of the original application for authority to discontinue operation of trains 11 and 16, the expense of operation of these two trains exceeded the income derived from their operations by over four thousand dollars per month. This financial loss continued from the time the original application was made to the Commission until Trains 11 and 16 were discontinued on October 25, 1949.

14. That, in addition to Trains 11 and 16, Plaintiff Railway operated, and continues to operate Trains 12 and 15 between Birmingham, Alabama, and Columbus, Mississippi,

which Trains 12 and 15, although mixed trains, carrying [fol. 384] both freight and passengers, has adequate facilities for hauling and handling the mail, and makes all regular and flag stops made by Trains 11 and 16. Train 15 is due to leave Birmingham daily at 7:15 a. m. and arrive in Columbus at 1:15 p. m. Train 16 is due to leave Columbus at 6:00 a. m. and arrive in Birmingham at 10:30 a. m. With the discontinuance of Trains 11 and 16, Plaintiff did not close, and does not threaten to close, any of the intermediate stations between Birmingham and Columbus.

15. That with the improvement made in highways, the use of privately owned automobiles, buses, trucks, vans, and other modes of conveyances, have increased, thereby causing a steady decline in the use of passenger trains by the travelling public, especially on short runs such as this one between Birmingham and Columbus, a distance of one hundred and twenty-two miles.

16. That the operation of mixed trains, such as Plaintiff's trains 12 and 15, now in daily service between Birmingham and Columbus, is adequate and sufficient to meet the demands and requirements of the public for railroad passenger service between these two points.

17. That, to require the Plaintiff Railway to continue the operation of Trains Nos. 11 and 16, at this heavy financial loss, which occurred over a long period of time before these trains were discontinued, and, by every prospect and likelihood, would continue should they be restored to service, is an unwarranted and illegal confiscation of Plaintiff's property.

Conclusions of Law

The Plaintiff, complaining of the constitutional invalidity of a state-made order, is held to the burden of showing that invalidity of convincing proof.

292 U. S. 290;
302 U. S. 305;
302 U. S. 388.

The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. There must be [fol. 385] due notice and an opportunity to be heard, the

procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily.

227 U. S. 88;
298 U. S. 38;
301 U. S. 292.

When the Commission gives a fair hearing, received and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily, the requirements of procedural due process are met, and the question that remains for a federal court is not as to the mere correctness of the method and reasoning adopted by the regulating agency but whether the order will result in confiscation.

302 U. S. 388.

OPINION OF THE COURT

When considered and weighed in connection with the fact that Plaintiff's application for permission to discontinue the two trains had been for about fifteen months on December 5, 1949, before the Commission, and no action whatever taken on the application; the position taken by the Commission that it would not hear nor consider the application until after the Plaintiff restored the two trains to service, irrespective of any great further loss and irreparable injury the Plaintiff would sustain in obeying the demand of the Commission in restoring the trains to service, the least the Commission could have done under the circumstances, in a proper spirit of fairness and justice, would have been to defer making its demand and calling the attention of the Plaintiff to the Alabama statutes providing for the heavy penalties Plaintiff would be subject to if it did not promptly comply with the Commission's order.

The manner of treating the application of the Plaintiff, then pending before the Commission, it appears to this Court, amounted to a threat on the part of the Commission to invoke the penalties provided for in the Alabama statutes against the Plaintiff.

[fol. 386] This Court is of the opinion and so holds, that the motions to dismiss and stay should be, and are, denied and the relief as prayed for in the Plaintiff's bill of complaint as amended should be, and is, granted.

The Attorneys for the Plaintiff will prepare and present to the Court a proper decree in keeping with this findings and opinion.

This 6th day of February, 1950.

Leon McCord, U. S. Circuit Judge; John McDuffie, U. S. District Judge; Charles B. Kennamer, U. S. District Judge.

[File endorsement omitted.]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 645-N

SOUTHERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, et als., Defendants

FINAL JUDGM'NT OR DECREE—Filed February 13, 1950

This cause coming on to be heard before a duly constituted Three Judge District Court and having been submitted by agreement of the parties for final decree upon the pleadings in the cause and upon the evidence offered herein, including a transcript of the testimony presented at the hearing before the defendant Alabama Public Service Commission at the court house at Fayette, Alabama on December 8, 1949, for the reasons set forth in the findings of fact, conclusions of law and the opinion of the Court filed herein, it is now

[fol. 387] Ordered, Adjudged and Decreed this 13 day of February, 1950, as follows, viz:

(1) that the motions of the defendants to dismiss and to stay proceedings in this cause be denied;

(2) that the orders of the defendant Alabama Public Service Commission dated December 5, 1949 and January 9, 1950 be vacated and declared to be null, void and of no effect; and that a permanent injunction be issued enjoining the defendants Alabama Public Service Commission, Gordon Persons, its President, Jimmy Hitchcock and C. C.

(Jack) Owen, Associate Commissioners, and A. A. Carmichael, Attorney General of the State of Alabama, and each of them, from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of said orders or of either of them or to enforce any penalties or other remedies against the plaintiff, its officers, agents or employees, on account of the failure to observe the provisions and requirements of the said orders or either of them by discontinuing and not restoring the operation of plaintiff's local passenger trains Nos. 11 and 16 between Birmingham, Alabama and the Alabama-Mississippi state line; and

(3) that the bond given by the plaintiff on the issuance of the restraining order herein, which by consent of the defendants was continued in force pending a decision of the cause, be discharged and that the plaintiff as principal and American Surety Company of New York as surety be discharged and relieved of any and all liability thereunder.

Leon McCord, United States Judge, Court of Appeals, Fifth Circuit; C. B. Kennamer, Judge, United States District Court, Middle District of Alabama; John McDuffie, Judge, United States District Court, Southern District of Alabama.

[File endorsement omitted.]

[fols.388-404] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 12, 1950

The petition of the Alabama Public Service Commission, Gordon Persons, as its President, Jimmy Hitchcock and C. C. (Jack) Owen, as Associate Commissioners, and A. A. Carmichael, as Attorney General of the State of Alabama, the defendants in the above styled cause, for an appeal from the final decree of the three judge District Court made and entered on the 13th day of February, 1950, is hereby granted and the appeal is allowed; bond conditioned to pay the costs of said appeal if same should not be sustained, is

hereby fixed in the sum of $500.00, such bond, with sufficient sureties, being presented to the Court, is hereby approved.

It is further ordered that this appeal shall be made returnable to the Supreme Court of the United States within forty days from this date, to-wit, on the 20th day of May, 1950, and that this order shall be treated as a citation to the Plaintiff Southern Railway Company, a corporation, as appellee upon said appeal, and to its attorneys of record, to appear in the Supreme Court of the United States and defend said appeal; and that a copy of this order and citation be forthwith served upon said appellee or its attorneys of record.

C. B. Kennamer, United States District Judge.

[File endorsement omitted.]

[fol. 405] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF RECORD—Filed June 24, 1950

Come the appellants and file with the Clerk the following statement of the points on which the appellants intend to rely:

1. The lower Court erred in overruling and denying the motion of the defendants to dismiss the action, which motion was filed on, to-wit, the 14th day of December, 1949, and was overruled and denied on, to-wit, the 13th day of February, 1950.

2. The lower Court erred in overruling and denying the motion of the defendants to stay the action, pending determination in the Courts of the State of Alabama of the appeals which might be taken by the plaintiff from the orders or decrees of Alabama Public Service Commission complained of in the complaint, which motion to stay was filed in this cause, to-wit, on the 12th day of January, 1950 and was overruled and denied by the Court on, to-wit, the 13th day of February, 1950.

3. The lower Court erred in assuming and exercising jurisdiction of this cause.

4. The lower Court erred in proceeding with the hearing of this cause prior to the determination in the courts of the State of Alabama of the appeals which might be taken by the plaintiff from the orders or decrees of the Alabama Public Service Commission complained of in the complaint.

The appellants designate the following parts of the record which they think necessary for the consideration of the foregoing points.

1. The original bill of complaint and the exhibits thereto filed December 6, 1949.

[fol. 406] 2. The temporary restraining order issued December 6, 1949.

3. The summons to answer said complaint dated December 6, 1949.

4. The designation of the three Judges to serve on the District Court of three judges filed December 13, 1949.

5. The motion to dismiss the action filed December 14, 1949.

6. The amendment to the complaint filed January 12, 1950.

7. The amendment to the motion to dismiss the action filed January 12, 1950.

8. The motion to stay the action filed January 12, 1950.

9. The answer of the defendants, including the exhibits thereto filed January 12, 1950.

10. The opinion of the three-Judge District Court, including the statement of the case, the questions to be determined by the Court, the findings of fact, the questions of law and the opinion of the Court filed February 8, 1950.

11. The order of the Alabama Public Service Commission under Docket No. 12225 of said Commission dated December 5, 1949.

12. The order of the Alabama Public Service Commission under Docket Number 12221 of said Commission dated January 9, 1950.

13. The final judgment or decree made and entered February 13, 1950.

A. A. Carmichael, Attorney General of Alabama; M. R. Nachman, Assistant Attorney General of Alabama; Richard T. Rives, Attorneys for Appellants.

Service of a copy of the foregoing statement and designation is hereby accepted this 23rd day of June, 1950.

Marion Rushton, of Counsel for Appellee.

[fol. 406a] [File endorsement omitted.]

[fol. 407] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 146

ORDER NOTING PROBABLE JURISDICTION—October 9, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 54,652, U. S. D. C., Middle Alabama, Term No. 146. Alabama Public Service Commission, et al., Appellants, vs. Southern Railway Company. Filed June 24, 1950. Term No. 146 O. T. 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 146

ABAMA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY

AL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA

STATEMENT AS TO JURISDICTION

A. A. CARMICHAEL,
M. R. NACHMAN,
RICHARD T. RIVES,
Counsel for Appellants.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 645-N

SOUTHERN RAILWAY COMPANY, A CORPORATION,
Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, AS ITS PRESIDENT, JIMMY HITCHCOCK AND C. C. (JACK) OWEN, AS ASSOCIATE COMMISSIONERS, AND A. A. CARMICHAEL, AS ATTORNEY GENERAL OF THE STATE OF ALABAMA,
Defendants

JURISDICTIONAL STATEMENT

Come the defendants Alabama Public Service Commission, Gordon Persons as its President, Jimmy Hitchcock and C. C. (Jack) Owen, as Associate Commissioners, and A. A. Carmichael, as Attorney General of the State of Alabama, pursuant to United States Supreme Court Rule 12, Paragraph 1, and file this, their statement of the basis upon which it is contended that the Supreme Court of the United States has appellate jurisdiction.

(a) The appeal herein is from the final decree made and entered by the District Court of the United States specially constituted under Title 28, Sections 2281 and 2284, United

States Code, and as provided in Section 1253, Title 28, United States Code, a direct appeal to the Supreme Court of the United States may be taken from the final decree made by such a specially constituted District Court. It is further provided by Title 28, Section 2101 (b) that such a direct appeal to the Supreme Court of the United States from such a final decree may be taken within sixty days.

(b) The statutes of the State, the validity of which are involved are Code of 1940, Title 48, Sections 35 and 106, each read as follows:

> "Sec. 35 Abandonment of service, regulated—No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate."

> "Section 106. *Permit to abandon service*—No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment."

(c) The final decree appealed from was made and entered on the 13th day of February, 1950.

(d) The application for appeal was presented on the 12th day of April, 1950.

(e) The final decree appealed from denied the motion of the defendants to dismiss the action, which motion to dismiss was based upon the ground that the Court judicially knows that Title 48, Sections 35 and 106 of the Code of Alabama 1940 are constitutionally valid, and on the further ground that it affirmatively appears from the complaint that the plaintiff Southern Railway Company has abandoned the operation of its passenger trains Nos. 11 and 16 between Birmingham, Alabama and the Alabama-Mississippi state line enroute to and from Columbus, Mississippi without obtaining from the Alabama Public Service Commission a permit allowing such abandonment in violation of Sections 35 and 106 of Title 48 of the 1940 Code of Alabama; and in further violation of a lawful order of the Alabama Public Service Commission. The final decree appealed from also denied the motion of the defendants to stay any actions, orders or decrees under this complaint, pending the determination in the courts of the State of Alabama on the appeals which might be taken by the plaintiff from the orders and decrees of the Alabama Public Service Commission complained of in the complaint. The final decree appealed from permanently enjoined the defendants Alabama Public Service Commission, Gordon Persons, as its President, Jimmy Hitchcock and C. C. (Jack) Owen, as Associate Commissioners, and A. A. Carmichael, as Attorney General of the State of Alabama, and each of them, from enforcing the provisions of the orders of the Alabama Public Service Commission dated December 6, 1949 and January 9, 1950, or either of them, or from enforcing any penalties or other remedies against the plaintiff, its officers, agents or empolyees on account of the failure to observe the provisions and requirements of

the said orders, or either of them, by discontinuing and not restoring the operation of plaintiff's local passenger trains, Nos. 11 and 16 between Birmingham, Alabama, and the Alabama-Mississippi State line. It is from that final decree that this appeal is taken.

(f) The following decisions of this Court are believed to sustain jurisdiction of this appeal under United States Code Title 28, Section 1253:

R. R. Comm. of Texas v. Pullman Co. 312 U. S. 496, 61 S. Ct. 643.

R. R. Comm. of Cal. v. Pac. Coast Electric Co., 302 U. S. 388, 58 S. Ct. 334.

(g) The grounds upon which it is contended that the questions involved are substantial are briefly as follows:

(a) The statutory law in Alabama relating to the Public Service Commission and to the regulation of public utilities is contained in Title 48 of the 1940 Code of Alabama. By Section 18 of that title, the Public Service Commission is vested with general supervision of public utilities. Section 35 provides that no utility shall abandon any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, etc., not here involved, until written application is made to the Commission for the issuance of a certificate that the present or future public convenience or necessity permit such abandonment and until such certificate has been issued. Section 106 of said title is to like effect as Section 35, but directed particularly to transportation companies. The plaintiff Southern Railway Company suspended the operation of its trains Nos. 11 and 16 between Birmingham, Alabama and the Mississippi-Alabama state line enroute to and from Columbus, Mississippi, acting solely under the authority of Service Order No. 843 of the Inter-state Commerce Commission. The effective period of said service order

843 was terminated by order No. 843-A of the Interstate Commerce Commission effective as of 11:59 P.M. November 2, 1949. Prior to the termination of the effective period of the aforesaid Service Order No. 843 of the Interstate Commerce Commission, the Alabama Public Service Commission had notified the plaintiff Southern Railway Company, along with every other railroad company operating in the State of Alabama, that each and every train which might have been removed under the authority of said Service Order No. 843 should be restored to service within twenty-four hours after said order might be terminated. Also prior to the termination of the effective period of the aforesaid service order No. 843 of the Interstate Commerce Commission, the Alabama Public Service Commission had, on November 16, 1949, ordered a public hearing of the original petition of the plaintiff Southern Railway Company for authority to discontinue its said two passenger trains and of the supplemental petition of the plaintiff for authority to not restore the operation of said two trains, and notice of said hearing had been issued to said Southern Railway Company and to all interested parties, said petitions being set for a hearing in Fayette, Alabama, at the Fayette County Court House commencing at 9:00 A.M., Thursday, December 8, 1949. After such setting for hearing of said petitions, the complaint in this action was filed on the 6th day of December, 1949, and a temporary restraining order was issued, which temporary restraining order expressly permitted the defendants to proceed with such hearing set for December 8, 1949, at Fayette, Alabama, and such hearing was duly held at said time and place and resulted in the report and order of the Alabama Public Service Commission dated on the 9th day of January, 1950, denying the application of the Plaintiff Southern Railway Company for authority to discontinue the operation of its said two passenger trains Nos. 11 and 16 between Birmingham, Alabama, and Columbus, Mississippi, in so far as the same are operated in Alabama.

Section 29 of Title 48 of the 1940 Code of Alabama provides for an appeal from any final action or order of the Alabama Public Service Commission to the Circuit Court of Montgomery County, in Equity, and thence to the Supreme Court of Alabama.

Sections 81 and 84 of Title 48 of the 1940 Code of Alabama provide that on any such appeal the order or action appealed from may be stayed or superseded by the State Appellate Court or the Judge thereof upon hearing after consideration of the testimony taken before the Commission. Except in rate cases not here involved, such supersedeas may be ordered by said Court or Judge without the requirement of any supersedeas bond.

Section 82 of Title 48 of the 1940 Code of Alabama provides that the Appellate Court shall hear the case upon the certified record and shall set aside the order of the Alabama Public Service Commission if the Court finds that the Commission erred in the prejudice of appellant's substantial rights in its application of the law, or that the order was based upon a finding of facts contrary to the substantial weight of the evidence. That section has been broadly construed by the Alabama Supreme Court so as to afford due process under the Fourteenth Amendment to the Constitution of the United States and so as to require the Appellate Court, whenever confiscation is claimed, to review the orders of the Commission both as to the law and the facts, on the Court's own independent judgment.

Ala. Pub. Serv. Comm v. So. Bell Tel. & Co., 42 So. 2d 655.

Ala. Pub. Serv. Comm. v. Mobile Gas Co., 213 Ala. 50, 104 So. 538.

The statutes of Alabama provide no means by which the Public Service Commission can issue process for the

enforcement of its orders, but provide that the courts may compel compliance with the order of the Commission.

Code of Alabama 1940, Title 48, Sections 50 and 78.

The Alabama Supreme Court has held that the commission's orders may be enforced by the courts by the issuance of writs of mandamus.

Ala. Pub. Serv. Comm. v. *W. U. Tel. Co.*, 208 Ala. 243, 94 So. 472.

The answer in this case takes issue that no criminal prosecution or civil penalties have been threatened against the plaintiff Southern Railway Company, and the most that the evidence discloses is that Alabama Public Service Commission has directed the plaintiff's attention to the provisions of the criminal statute to the effect that any utility which knowingly or willfully violates any lawful order of said Commission shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than $1000.00 for each offense; and that each day's violation shall be deemed to be a separate offense.

Code of Ala. 1940, Title 48, Sec. 399.

The final decree of the three judge district court from which this appeal is taken is contrary to and in conflict with the following decisions of the Supreme Court of the United States.

Burford v. *Sun Oil Co.*, 319 U. S. 315, 87 L. Ed. 1424;

R. R. Comm. of Texas v. *Pullman Co.*, 312 U. S. 496, 51 S. Ct. 643;

Beal v. *Missouri Pacific R. R. Co.*, 312 U. S. 45, 61 S. Ct. 418;

Chicago et als v. *Fieldcrest Dairies*, 316 U. S. 166, 62 S. Ct. 986;

See also *Moore's Commentary on the U. S. Judicial Code*, pp. 400 *et seq*;

54 Harv. L. Rev., 1379.

The above cited authorities show clearly that where the state judicial process is by-passed in cases concerning the action of state administrative agencies, and where the action of those agencies is sought to be enjoined in Federal Courts, a substantial question involving conflicting state and federal interests is presented for this Court to consider on appeal.

(h) There is appended hereto a copy of the opinion of the three judge Federal Court delivered upon the rendering of the decree sought to be reviewed.

Respectfully submitted,

(S.) A. A. CARMICHAEL,
Atty. Gen. of Alabama.
(S.) M. R. NACHMAN,
Asst. Atty. Gen. of Ala.
(S.) RICHARD T. RIVES,
Of Counsel for Defense.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 645-N

SOUTHERN RAILWAY COMPANY, a Corporation, *Plaintiff*,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, its President, and JIMMY HITCHCOCK and C. C. (JACK) OWENS, Associate Commissioners; and A. A. CARMICHAEL, Attorney General of the State of Alamaba, *Defendants*

Before Leon McCord, Circuit Judge, and John McDuffie and Charles B. Kennamer, District Judges

KENNAMER, *District Judge:*

Statement of the Case

Plaintiff, Southern Railway Company, a corporation, organized and existing under the laws of the State of Virginia, is engaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points in other States throughout the South.

The Defendant Alabama Public Service Commission, is an Administrative body, created under the laws of the State of Alabama, and authorized to exercise certain regulatory powers over the Plaintiff and other common carriers by railroad within the State of Alabama. (Title 48, Section 1, and Section 106, Code of Alabama, 1940.)

Plaintiff Railway, by complaint as amended, petitions this Court for injunctive relief to enjoin the Defendants, their agents, etc., from proceeding against the Plaintiff, its officers, etc., to enforce any penalties or other remedies provided by the laws of the State of Alabama, by reason of Plaintiff's failure to restore the operation of Trains Nos. 11 and 16, as required by order of the Defendant Commis-

sion of December 5, 1949, and as is inherent in the Commission's report and order of January 9, 1950.

The Defendants filed a motion to dismiss the bill of complaint as amended; a motion to stay the proceedings in this Court; and, without waiving any of these motions or the grounds thereof, an answer to the bill of complaint as amended.

The Court heard this cause, by consent of the parties Plaintiff and Defendants, on the Defendant's motion to dismiss, motion to stay the cause in this Court, and on Plaintiff's application for a temporary and permanent injunction, and on the merits of the bill and answer.

After the Court announced the cause would be so heard, the respective parties offered evidence, and at the conclusion of the taking of the evidence, oral arguments were heard by the Court and permission was given the parties to file written briefs with the Court within fifteen days, and the cause was taken under advisement by the Court.

Questions to be Determined by the Court

The main question raised by the motions to dismiss and stay, is, whether this Court should entertain this action at this time, irrespective of the impact the orders of the Commission had on the Plaintiff, or in spite of their questionable constitutionality.

The main question presented to this Court by the bill and answer is, whether the orders of the Defendant Commission of December 5, 1949 and January 9, 1950, is a violation of due process of law, as provided for by the 14th amendment to the Federal Constitution, and will result in an illegal confiscation of the Plaintiff's property.

Findings of Fact

1. Plaintiff Railway is a foreign corporation, organized and existing under the laws of the State of Virginia, is engaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points in other States throughout the South.

2. The jurisdictional amount of three thousand dollars, exclusive of interest, is involved. The bill of complaint, as

amended, contains allegations of denial of due process of law, as provided for by the 14th amendment to the Federal Constitution. The parties are properly before the Court and this Court has jurisdiction to hear and determine the issues involved. No suit is pending at this time in any of the Courts of the State of Alabama between the parties to this litigation, therefore, the rule of comity is not applicable.

3. Plaintiff Railway did, on September 13, 1948, file an application with the Defendant Commission for authority to discontinue operation in Alabama of Trains Nos. 11 and 16, as required by Sections 35 and 106 of the Code of Alabama, Title 48.

4. Plaintiff Railway did, on October 25, 1949, and in compliance with an order of the Interstate Commerce Commission made to effectuate a saving in the use of coal, discontinue operation of passenger Trains Nos. 11 and 16.

5. Plaintiff Railway did, on November 10, 1949, file a supplemental petition with the Defendant Commission for authority to be relieved of the necessity of restoring to operation Trains 11 and 16 within the State of Alabama.

6. The Interstate Commerce Commission did, on November 14, 1949, issue an order vacating and setting aside the order under which Plaintiff Railway had, on October 25, 1949, discontinued operation of Trains 11 and 16.

7. Plaintiff Railway did, on numerous occasions, after the filing of the original application with the Defendant Commission, and after the filing of the supplemental petition, make requests to the Commission for an opportunity to be heard on the original application and the supplemental petition, but were denied such a hearing by the Commission; the Commission stating that no such hearing would be held until the Trains had first been restored to service.

8. The Defendant Commission did, on December 5, 1949, enter an order requiring the Plaintiff to restore Trains 11 and 16 to service, and calling Plaintiff's attention to certain statutory penalties made and provided for in the event of a refusal.

9. Plaintiff Railway did, on December 6, 1949, file in this Court a bill for a temporary restraining order against the enforcement of the order of December 5, 1949, by the Commission. A temporary restraining order was granted by the Judge of this Court and the hearing on the bill for a temporary and permanent injunction was set for hearing before a three Judge Court for December 15, 1949, which hearing, at the request and consent of the Defendants, filed in this Court on December 14, 1949, was passed until the 9th day of January, 1950, and later, at their request and consent, to the 12th day of January, 1950.

10. The Defendant Commission did, on December 8, 1949, hold a hearing at the Court House at Fayette, Alabama, at which time the Plaintiff Railway was given an opportunity and did, present evidence and argument in support of the original application and supplemental petition.

11. The Defendant Commission did, on January 9, 1950, make and file a report and order denying the Plaintiff's original application and supplemental petition.

12. The Defendant Commission took no action on the original application, filed by the Plaintiff with the Commission on September 13, 1948, for authority to discontinue operation in Alabama of Trains 11 and 16, from the time the original application was filed until the trains were discontinued by order of the Interstate Commerce Commission on October 25, 1949.

13. That for a period of about fifteen months prior to the filing of the original application for authority to discontinue operation of trains 11 and 16, the expense of operation of these two trains exceeded the income derived from their operations by over four thousand dollars per month. This financial loss co inued from the time the original application was made to the Commission until Trains 11 and 16 were discontinued on October 25, 1949.

14. That, in addition to Trains 11 and 16, Plaintiff Railway operated, and continues to operate Trains 12 and 15 between Birmingham, Alabama, and Columbus, Mississippi, which Trains 12 and 15, although mixed trains, carrying

both freight and passengers, has adequate facilities for hauling and handling the mail, and makes all regular and flag stops made by Trains 11 and 16. Train 15 is due to leave Birmingham daily at 7:15 a. m. and arrive in Columbus at 1:15 p. m. Train 16 is due to leave Columbus at 6:00 a. m. and arrive in Birmingham at 10:30 a. m. With the discontinuance of Trains 11 and 16, Plaintiff did not close, and does not threaten to close, any of the intermediate stations between Birmingham and Columbus.

15. That with the improvement made in highways, the use of privately owned automobiles, buses, trucks, vans, and other modes of conveyances, have increased, thereby causing a steady decline in the use of passenger trains by the travelling public, especially on short runs such as this one between Birmingham and Columbus, a distance of one hundred and twenty-two miles.

16. That the operation of mixed trains, such as Plaintiff's trains 12 and 15, now in daily service between Birmingham and Columbus, is adequate and sufficient to meet the demands and requirements of the public for railroad passenger service between these two points.

17. That, to require the Plaintiff Railway to continue the operation of Trains Nos. 11 and 16, at this heavy financial loss, which occurred over a long period of time before these trains were discontinued, and, by every prospect and likelihood, would continue should they be restored to service, is an unwarranted and illegal confiscation of Plaintiff's property.

Conclusions of Law

The Plaintiff, complaining of the constitutional invalidity of a state-made order, is held to the burden of showing that invalidity by convincing proof.

292 U. S. 290;
302 U. S. 305;
302 U. S. 388.

The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. There must be

due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily.

227 U. S. 88;
298 U. S. 38;
301 U. S. 292.

When the Commission gives a fair hearing, received and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily, the requirements of procedural due process are met, and the question that remains for a federal court is not as to the mere correctness of the method and reasoning adopted by the regulating agency but whether the order will result in confiscation.

302 U. S. 388.

Opinion of the Court

When considered and weighed in connection with the fact that Plaintiff's application for permission to discontinue the two trains had been for about fifteen months on December 5, 1949, before the Commission, and no action whatever taken on the application; the position taken by the Commission that it would not hear nor consider the application until after the Plaintiff restored the two trains to service, irrespective of any great further loss and irreparable injury the Plaintiff would sustain in obeying the demand of the Commission in restoring the trains to service, the least the Commission could have done under the circumstances, in a proper spirit of fairness and justice, would have been to defer making its demand and calling the attention of the Plaintiff to the Alabama statutes providing for the heavy penalties Plaintiff would be subject to if it did not promptly comply with the Commission's order.

The manner of treating the application of the Plaintiff, then pending before the Commission, it appears to this Court, amounted to a threat on the part of the Commission to invoke the penalties provided for in the Alabama statutes against the Plaintiff.

This Court is of the opinion and so holds, that the motions to dismiss and stay should be, and are, denied and the relief as prayed for in the Plaintiff's bill of complaint as amended should be, and is, granted.

The Attorneys for the Plaintiff will prepare and present to the Court a proper decree in keeping with this findings and opinion.

This 6th day of February, 1950.

LEON MCCORD,
U. S. Circuit Judge;
JOHN MCDUFFIE,
U. S. District Judge;
CHARLES B. KENNAMER,
U. S. District Judge.

Filed Feb. 8, 1950.
O. D. STREET, JR.,
Clerk,
By ANNIE SCHOOLAR,
Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISON

Civil Action No. 645-N

SOUTHERN RAILWAY COMPANY, a Corporation, *Plaintiff,*
vs.
ALABAMA PUBLIC SERVICE COMMISSION, ET ALS., *Defendants*

Final Judgment or Decree

This cause coming on to be heard before a duly constituted Three-Judge District Court and having been submitted by agreement of the parties for final decree upon the pleadings in the cause and upon the evidence offered herein, including a transcript of the testimony presented at the hearing before the defendant Alabama Public Service Commission at the court house at Fayette, Alabama on December 8, 1949, for the reasons set forth in the findings of fact, conclusions of law and the opinion of the Court filed herein, it is now

Ordered, Adjudged and Decreed this 13 day of February, 1950, as follows, viz:

(1) that the motions of the defendants to dismiss and to stay proceedings in this cause be denied;

(2) that the orders of the defendant Alabama Public Service Commission dated December 5, 1949 and January 9, 1950 be vacated and declared to be null, void and of no effect; and that a permanent injunction be issued enjoining the defendants Alabama Public Service Commission, Gordon Persons, its President, Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners, and A. A. Carmichael, Attorney General of the State of Alabama, and each of them, from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of said orders or of either of them or to enforce any penalties or other remedies against the plaintiff, its officers, agents or employees, on account of the failure to observe the provisions and requirements of the said orders or either of them by discontinuing and not restoring the operation of plaintiff's local passenger trains Nos. 11 and 16 between Birmingham, Alabama and the Alabama-Mississippi state line; and

(3) that the bond given by the plaintiff on the issuance of the restraining order herein, which by consent of the defendants was continued in force pending a decision of the cause, be discharged and that the plaintiff as principal and American Surety Company of New York as surety be discharged and relieved of any and all liability thereunder.

Leon McCord, United States Judge, Court of Appeals, Fifth Circuit; C. B. Kennamer, Judge, United States District Court, Middle District of Alabama; John McDuffie, Judge, United States District Court, Southern District of Alabama.

Filed Feb. 13, 1950. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 146.

ALABAMA PUBLIC SERVICE COMMISSION et als.,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

Appeal from the United States District Court
for the Middle District of Alabama.

BRIEF FOR THE APPELLANTS.

A. A. CARMICHAEL,
Attorney General of Alabama,
WALLACE L. JOHNSON,
Assistant Attorney General
of Alabama,
RICHARD T. RIVES,
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Cases Cited.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 146.

ALABAMA PUBLIC SERVICE COMMISSION et als.,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

Appeal from the United States District Court
for the Middle District of Alabama.

BRIEF FOR THE APPELLANTS.

OPINION BELOW.

This case is reported below as **Southern Railway Co. v. Alabama Public Service Commission et als.**, 88 F. Supp. 441.

JURISDICTION.

The jurisdiction of this Court is based upon 28 U. S. C. 1253 and 2101 (b), providing for direct appeal to the Supreme Court of the United States within sixty days from an order granting or denying an interlocutory or permanent injunction in any case required to be determined by a district court of three judges, this being an appeal from the granting of an injunction by a three-judge District Court specially constituted under 28 U. S. C. 2281 and 2284.

QUESTIONS PRESENTED.

A special three-judge District Court was constituted under 28 U. S. C. 2281 and 2284, which sections related to injunction against enforcement of state statutes or orders of state administrative agencies alleged to be unconstitutional.

1. Should such court enjoin enforcement of criminal laws of a state against a railroad which has violated an order of the state Public Service Commission directing it to comply with state statutes requiring that trains may not be taken out of operation without authority from the Commission, if the only possible injury to the railway is the consequence of its willful and continuing violation of law, and the Commission has made no move toward enforcement of the criminal law except to point out one of the applicable criminal penalties?

2. Does such court have jurisdiction to enjoin enforcement of statutes not identified or attacked as unconstitutional or of common law remedies such as mandamus?

3. Does such court have jurisdiction where plaintiff makes only a colorable attack on the constitutionality of

a statute and does not pray for relief from enforcement of such statute, and does not seek relief from the order attacked as unconstitutional, but from all penalties and remedies known to the law of the state?

4. Should such court abstain from exercising its jurisdiction where

(a) To exercise it will be to appraise and supervise state policy as carried out by a state administrative agency in terms of local needs and in accord with local law?

(b) Where authoritative interpretation of state statutes should be awaited?

(c) To await state action which may make unnecessary a decision on constitutional issues?

STATUTES INVOLVED.

The statutes involved are printed in Appendix A.

SPECIFICATION OF ERRORS.

1. The lower court erred in overruling and denying the motion of the defendants to dismiss the action, which motion was filed on, to-wit, the 14th day of December, 1949, and was overruled and denied on, to-wit, the 13th day of February, 1950.

2. The lower court erred in overruling and denying the motion of the defendants to stay the action, pending determination in the courts of the State of Alabama of the appeals which might be taken by the plaintiff from the orders or decrees of the Alabama Public Service Commission complained of in the complaint, which motion to stay was filed in this cause on, to-wit, the 12th day of January, 1950, and was overruled and denied by the court on, to-wit, the 13th day of February, 1950.

3. The lower court erred in rendering the final decree rendered on, to-wit, the 13th day of February, 1950.

4. The lower court erred in assuming and exercising jurisdiction of this cause.

5. The lower court erred in proceeding with the hearing of this cause prior to the determination in the courts of the State of Alabama of the appeals which might be taken by the plaintiff from the orders or decrees of the Alabama Public Service Commission complained of in the complaint.

6. The court erred in vacating and declaring null and void and of no effect the order of the defendant Alabama Public Service Commission dated December 5, 1949.

7. The court erred in vacating and declaring null and void and of no effect the order of the Alabama Public Service Commission dated January 9, 1950.

8. The court erred in decreeing that the permanent injunction be issued, enjoining the defendants, and each of them, from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of the orders of the Alabama Public Service Commission dated December 5, 1949, and January 9, 1950, or of either of them, or to enforce any penalties or other remedies against the plaintiff, its officers, agents, or employees, on account of the failure to observe the provisions of said orders, or either of them, by discontinuing and not restoring the operation of plaintiff's local passenger trains Nos. 11 and 16 between Birmingham, Alabama, and the Alabama-Mississippi state line.

STATEMENT OF THE CASE.

Appellee, hereinafter referred to as Southern, has operated trains between Birmingham, Alabama, and Columbus, Mississippi, and between Sheffield, Alabama, and Chattanooga, Tennessee, as a part of its railroad system. This case, No. 146, relates to the Birmingham-Columbus trains, while the companion case before this Court, No. 395, deals with the Sheffield-Chattanooga trains. All these trains are subject to regulation by the Alabama Public Service Commission insofar as they operate within the State of Alabama.

Trains 11 and 16 between Birmingham and Columbus were taken out of operation on October 25, 1949, in compliance with Service Order 843 of the Interstate Commerce Commission relating to the conservation of coal (R. p. 19). Prior to this time, in September, 1948, Southern had filed with the Alabama Public Service Commission an application for authority to discontinue the operation of these two trains (R. pp. 14-18). While the trains were inoperative Southern amended its petition requesting that it not be required to restore the operation of the trains (R. pp. 21-25). The petition as amended was set for hearing in Fayette, Alabama, on December 8, 1949.

Service Order 843-A of the Interstate Commerce Commission vacated and set aside Order 843 as of November 20, 1949 (R. pp. 26-27). Prior to the termination of the effective period of Order 843 the Commission had notified Southern, along with every other railroad company operating in the State of Alabama, that all trains removed under authority of Order 843 should be restored to service within twenty-four hours after the Order terminated (R. p. 26). After November 20, 1949, the Commission learned that operation of the Birmingham-Columbus trains had not been resumed. The President of the Commission

promptly wired Southern asking whether it intended to restore the trains immediately, and if not to supply the Commission with its authority for failing to restore them (R. p. 28). On November 22nd, R. K. McClain, Assistant Vice-President of Southern, wired the Commission that it did not intend to put the trains back in service (R. p. 30):

> "With all due regard for the Commission, it is not our intention to restore the operation of trains 11 and 16 until we are offered a hearing and decision on our supplemental petition for authority to keep them out of service stop Please be assured that our position is in no sense arbitrary or defiant but is we believe the only sound one we can properly take stop."

Immediately upon receipt of the refusal the Commission issued a citation to show cause, if any, why it should not enter of record an order specifying that the failure or refusal to restore the trains constituted a violation of the provisions of Title 48, Code of Alabama, 1940, and requiring that the violation be discontinued (R. pp. 31-33). The matter was set for hearing on November 25, 1949, and after such hearing the Commission issued an order dated December 5, 1949, finding that Southern's action did constitute a violation of Title 48 and ordering that the railway immediately discontinue the violation of law by restoring the operation of the two trains (R. pp. 33-37). The same order directed the attention of Southern to one of the penalty provisions of the Alabama Code:

> "It is further ordered by the Commission that the attention of the respondent Southern Railway Company be directed to Section 399 of Title 48 of the 1940 Code of Alabama, which provides in part that any utility doing business in this State which knowingly or willfully violates any lawful order of this Commission shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than $1,000.00 for each offense, and that in the case of a

violation of this Commission's orders each day's violation shall be deemed to be a separate offense."

The complaint in this action was filed on December 6, 1949, and a temporary restraining order was issued the same day (R. pp. 40-42) which specifically authorized, though it did not require, that the hearing on the petition for discontinuance, set for December 8, could proceed. Such hearing took place and an order, dated January 9, 1950, was issued (R. pp. 54-63) giving the opinion of the Commission that public convenience and necessity required the operation of the trains and that with the exercise of economy and experimentation with new and different devices and methods Southern could meet the public need without fear of a burdensome operation. Authority to discontinue the operation of the two trains was denied. Defendants filed a motion to dismiss (R. p. 43). Plaintiff amended its complaint to set up the order of January 9th (R. p. 46), and defendants thereupon amended the motion to dismiss (R. p. 47). Defendants also filed a motion to stay (R. p. 48) and an answer (R. p. 49).

A statutory three-judge District Court was convened, and the hearing on the motions, the temporary restraining order and the permanent injunction all were held at the same time on January 12, 1950. The Court issued a decree (R. p. 69) denying the motions to dismiss and to stay, declaring the orders of December 5th and January 9th to be vacated, null and void, and issued a permanent injunction restraining the defendants from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees to enforce the provisions of the orders or to enforce any penalties or other remedies against the plaintiff, its officers, agents or employees on account of failure to observe the provisions of the orders by discontinuing and not restoring the operation of the trains.

It is from this decree that this appeal is taken.

BRIEF OF THE ARGUMENT.

I.

A Federal Court Should Decline to Enjoin Enforcement of the Criminal Law of the State of Alabama.

Southern sought and obtained in this case an injunction forbidding enforcement against it of any and all remedies known to the law of the State of Alabama, including all criminal prosecutions. Interference by a federal equity court in the processes of state criminal law can be justified only in most exceptional circumstances and upon clear showing that an injunction is necessary to prevent irreparable injury.

Beal v. Missouri Pacific R. R. Corp., 312 U. S. 45, 61 S. Ct. 418 (1941).

The threatened injury must be great and immediate.

Douglas v. City of Jeannette, 319 U. S. 157, 63 S. Ct. 877 (1943);

Spielman Motor Sales Co. v. Dodge, 295 U. S. 89, 55 S. Ct. 678 (1935).

There was no injury here from operation of trains for they had been kept out of operation in violation of law. The only possible injury was from the consequences of Southern's own willful and continuing violation of the laws of the State.

Beal v. Missouri Pacific R. R. Corp., supra;
Douglas v. City of Jeannette, supra.

A federal equity court should not intervene where lawfulness or constitutionality of a statute or order may be determined as readily in a criminal case as in a suit for an injunction. The questions raised before the federal district court should have been raised as a defense had any

criminal case been brought in the courts in the State of Alabama.

Douglas v. City of Jeannette, supra;
Watson v. Buck, 313 U. S. 387, 61 S. Ct. 962 (1941);
Spielman Motor Sales Co. v. Dodge, supra.

There was no threat of multiplicity of prosecutions here, in fact there was no threat at all since the Commission only pointed out to Southern one of the penalty provisions which might apply to it as a consequence of its violation of the law. This is less than has been held to constitute a threat of criminal prosecution in other cases.

Watson v. Buck, supra.

Even if the action of the Commission were interpreted as a threat there was no showing that more than one prosecution was threatened.

Beal v. Missouri Pacific R. R. Corp., supra.

If there was threatened multiplicity of actions, the multiplicity arose solely out of Southern's willful and continued wrong doing.

Cf. **Ex Parte Young,** 209 U. S. 123, 28 S. Ct. 441 (1907);
Cf. **A. F. L. v. Watson,** 327 U. S. 582, 66 S. Ct. 761 (1946).

The result of the two Southern cases (No. 146 and No. 395) taken together, is to make the Alabama Public Service Commission powerless to keep trains operating in the State of Alabama.

II.

The Three-Judge Federal District Court Had No Jurisdiction of This Cause.

The jurisdictional requirements of 28 U. S. C. 2281 were not met as to any **statute** of the State of Alabama since

the attack on the Alabama statutes was colorable and not seriously contended for nor ruled upon and relief was not asked from the statutes.

Nor were such jurisdictional requirements met as to any order of the Commission since relief was not sought from the order but from all penalties and remedies known to the Alabama law. The relief given by the District Court was not extraordinary relief but exactly that prayed for. The relief given by the Court could not supply it with jurisdiction which it originally lacked.

Jurisdiction of the three-judge district court is strictly limited and should not be lightly extended.

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U. S. 386, 54 S. Ct. 732 (1934);
Phillips v. U. S., 312 U. S. 246, 61 S. Ct. 480 (1941).

The real complaint of Southern is against Alabama statutes, which it did not attack substantially.

A particular kind of order is here involved, i. e., orders which expressly or in effect direct compliance with the statutes, in contrast to orders issued by administrative agencies pursuant to authority given by an underlying statute as in **Oklahoma Natural Gas Co. v. Russell**, 281 U. S. 290, 43 S. Ct. 353 (1923).

III.

The Federal Court Should Abstain From Exercising Jurisdiction of Matters Properly Decided by State Courts.

Whether this case was within the jurisdiction of a three-judge district court or should have been before a one-judge court, any federal court should have abstained from exercising jurisdiction since the matter involved was one properly decided first by courts of the State of Alabama.

The predominant reason behind three-judge court legislation was a congressional purpose to avoid unnecessary interference with laws of a sovereign state, hence there must be exceptional circumstances before the federal judiciary should intervene.

Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368, 69 S. Ct. 606 (1949).

There is a congressional requirement of strict construction of this legislation to protect the effectiveness of the federal judiciary and the appellate docket of the Supreme Court.

Phillips v. U. S., 312 U. S. 246, 61 S. Ct. 480 (1941); **Stainback v. Mo Hock Ke Lok Po, supra.**

The trend of federal legislation and of the decisions of the Supreme Court has been to confine within narrow limits the power of federal courts to interfere with state courts and state action through injunction.

Moore, **Commentary on the U. S. Judicial Code** (Bender, 1949), pp. 54, 400.

There are numerous areas in which a federal equity court may decline to exercise its jurisdiction concerning state affairs. See the full discussion in **Meredith v. City of Winter Haven**, 320 U. S. 228, 64 S. Ct. 7 (1943), and Moore, **supra**, pp. 400-402. The areas of especial pertinence here are:

Where exercise of jurisdiction will result in appraisal or shaping of domestic policy of the state governing its administrative agencies.

Where authoritative state interpretation of a statute will be awaited to avoid possible decisional conflict, especially where the statute is complex.

Where state action will be awaited because a decision on constitutional issues thereby may become unnecessary.

In this case federal courts have stepped in to govern policy of the state of Alabama as carried out through the Public Service Commission. These two cases (Nos. 146 and 395) are merely the first two of six which have already been filed in the same federal judicial district with at least two of the same three judges sitting on each case, all concerned with injunctions against enforcement of orders of the Public Service Commission relating to discontinuance of local train service. This has been done prior to a definitive ruling from an Alabama court on whether the Commission's present definition and application of "public convenience and necessity" is proper and correct.

The Commission is dealing with a problem little less complex than that of oil proration in **Railroad Commission v. Rowan & Nichols Oil Co.**, 311 U. S. 570, 61 S. Ct. 343 (1941). Regulation of local train service must be constantly readjusted and before any decision is reached an open hearing in the affected communities must be held.

Railroad Commission v. Pullman Company, 312 U. S. 496, 61 S. Ct. 643 (1941), and **Burford v. Sun Oil Company**, 319 U. S. 315, 63 S. Ct. 1098 (1943), control the situation presented by these cases, where the same sort of local administrative problems are involved.

The District Court should have stayed exercise of its jurisdiction pending authoritative interpretation by the Alabama courts of the Alabama statutes concerning public convenience and necessity.

Shipman v. DuPre, 339 U. S. 321, 70 S. Ct. 640 (1950);
Watson v. Buck, 313 U. S. 387, 61 S. Ct. 962 (1941);
Railroad Commission v. Pullman Co., 312 U. S. 496, 61 S. Ct. 643 (1941);
Chicago v. Fieldcrest Dairies, 316 U. S. 168, 62 S. Ct. 986 (1942);
A. F. L. v. Watson, 327 U. S. 582, 66 S. Ct. 761 (1946).

Likewise the court should have stayed its hand pending state action since a decision on constitutional grounds might have been avoided. The constitutionality of Sections 35 and 106 of Title 48, Code of Alabama, 1940, and of various applicable penalty provisions of Title 48, if ruled on first by the Supreme Court of Alabama might end this case. Also, if the Commission's order was unwarranted under Alabama standards of public convenience and necessity, then the case would end.

A. F. L. v. Watson, supra;
Spector Motor Service v. McLaughlin, 323 U. S. 101; 65 S. Ct. 152 (1944);
Chicago v. Fieldcrest Dairies, supra;
Railroad Commission v. Pullman Co., supra.

ARGUMENT.

I.

A Federal Court Should Decline to Enjoin Enforcement of the Criminal Laws of the State of Alabama.

Southern sought and obtained in this case an injunction forbidding enforcement against it of any and all remedies known to the law of the State of Alabama, including all criminal prosecutions. The Alabama law gives the Public Service Commission no power of its own to enforce its orders or the underlying statutes, and it is necessary that it turn to the Courts for enforcement.

Interference by a federal equity court in the processes of state criminal law can be justified only in most exceptional circumstances and upon clear showing that an injunction is necessary to prevent irreparable injury. In the exercise of sound discretion a federal court of equity must have scrupulous regard for the rightful independence of state governments.

Beal v. Missouri Pacific R. R. Corp., 312 U. S. 45, 61 S. Ct. 418 (1941).

The threatened injury must be both "great and immediate," otherwise the accused should set up his defense in State court, even though the validity of a statute is challenged, for there is ample opportunity for ultimate review by the Supreme Court of the United States of the questions which may be involved.

Douglas v. City of Jeannette, 319 U. S. 157, 63 S. Ct. 877 (1943);

Spielman Motor Sales Co. v. Dodge, 295 U. S. 89, 55 S. Ct. 678 (1935).

There was no possible injury in this case from operation of the trains involved for they were not running when the case was filed; in the teeth of the Alabama law Southern had refused to restore them to service after the Interstate Commerce Commission had lifted its restrictions on operations of coal burning trains (R. pp. 29-30). The only exceptional circumstance or injury involved was possible use by the Commission of provisions of the Alabama law whereby its orders can be enforced—several sections of the Alabama Code relate to penalties but exactly which apply is not clear.

> Title 48, Sections 110, 399, 400, 405; Code of Alabama 1940.

And the order of the Commission directing that the trains be restored to service could have been superseded in the Circuit Court on appeal so that the trains would have been out of operation during appellate review.

> Title 48, Section 81, Code of Alabama 1940.

The Public Service Commission issued a formal citation (R. pp. 33-37) ordering Southern to restore the trains and calling attention to provisions of Title 48, Section 399, wherein officers, agents and employees of a carrier which violates an order of the Commission are guilty of a misdemeanor and subject to fine, and each violation of the order is deemed a separate offense (R. p. 36). The three-judge court interpreted this as a threat to invoke penalties of law (R. p. 68).

In the Beal case, supra, the lower court found danger of irreparable injury in the threat of multiplicity of prosecutions and risk of large aggregate fines. This Honorable Court held (312 U. S. at 50, 61 S. Ct. at 421):

> "But whether more than one criminal prosecution is threatened was by the pleadings made an issue of

fact which the district court did not resolve. If it had been found after a hearing, as the answer alleges, that only a single suit is contemplated, we could not say that any such irreparable injury is threatened as would justify staying the prosecution and withdrawing the determination of the legal question from the state courts, whose appointed function is to decide it. Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 287, 29 S. Ct. 426, 430, 53 L. ed. 796; Spielman Motor Sales Co. v. Dodge, supra, 295 U. S. 96, 55 S. Ct. 681, 79 L. ed. 1322.

"If its decision should be favorable to respondent no reason is shown for anticipating further prosecutions. If it were adverse, penalties in large amount, it is true, might be incurred, but they may well be the consequence of violations of state law." (Emphasis supplied.)

In **Douglas v. City of Jeannette**, supra, this Court made the same point (319 U. S. at 165, 63 S. Ct. at 881-882):

"If the ordinance had been held constitutional, petitioners could not complain of penalties which would have been but the consequence of their violation of a valid state law."

Southern could suffer no injury at all except as a "consequence of violation of a valid state law," and it had deliberately set about to flaunt the law, while at the same time disclaiming its defiance (R. p. 30):

"With all due regard for the Commission, it is not our intention to restore the operation of trains 11 and 16 until we are afforded the hearing and decision on our supplementary petition for authority to keep them out of service."

There is nothing in the record to show that criminal penalties would have been invoked against Southern, but

if they had been the constitutionality of the order or statute violated could have been determined in the criminal case. Mere imminence of criminal prosecution is not a ground for equitable relief if the lawfulness or constitutionality of the statute involved may be determined as readily in the criminal case as in a suit for an injunction. In the **City of Jeannette** case, this Court held (319 U. S. at 164, 63 S. Ct. at 881):

> "It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court."

Accord: **Watson v. Buck**, 313 U. S. 387, 61 S. Ct. 962 (1941);

Spielman Motor Sales Co. v. Dodge, 295 U. S. 89, 55 S. Ct. 678 (1935).

What protection has Southern secured from a federal court that it could not have obtained in a state court in a criminal case, if brought? No protection was either given or needed as to losses from operation of the trains for the trains were not being operated. No doubt Southern will contend that a federal court could and did give relief from irreparable injury in the form of possible multiplicity of criminal actions, each day's violation being a separate offense. There are two answers to this: First, the record does not show any real and immediate danger of multiple actions. The Commission did no more than direct Southern's attention to the law (R. p. 36). The District Court found this to be a "threat . . . to invoke the penalties provided for in the Alabama statutes," even though the Commission never went beyond this mere pointing out of

the law. For a federal court to say that a duly authorized body of the state cannot even point out to a law-breaker the penalties for the crime which he is committing without thereby subjecting itself to an injunction against the enforcement of that law goes very far indeed. In **Watson v. Buck** this Court held insufficient as a basis for equitable intervention "a mere statement by a prosecuting officer that he intends to perform his duty" (313 U. S., at 400, 61 S. Ct., at 966):

> "A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity. And this is especially true where there is a complete absence of any showing of a definite and expressed intent to enforce particular clauses of a broad, comprehensive and multi-provisioned statute. For such a general statement is not the equivalent of a threat that prosecutions are to be begun so immediately, in such numbers, and in such manner as to indicate the virtual certainty of that extraordinary injury which alone justifies equitable suspension of proceedings in criminal courts. The imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraining of criminal proceedings is justified. Yet, from the lack of consideration accorded to this aspect of the complaint, both by complainants in presenting their case and by the court below in reaching a decision, it is clearly apparent that there was a failure to give proper weight to what is in our eyes an essential prerequisite to the exercise of this equitable power. The clear import of this record is that the court below thought that if a federal court finds a many-sided state crim-

inal statute unconstitutional, a mere statement by a prosecuting officer that he intends to perform his duty is sufficient justification to warrant the federal court in enjoining all state prosecuting officers from in any way enforcing the statute in question. Such, however, is not the rule."

Here no officer even went as far. Assuming the three-judge court's conclusion to be correct, the record does not show that there was a threat of more than one prosecution. If the appellants should make oppressive use of legal processes of the state, bring repeated or groundless actions, or otherwise threaten irreparable damage to Southern, then the federal courts may then be open to the railway upon its sufficiently alleging a case for equitable intervention. Second, as this Court pointed out in **Beal** and **City of Jeannette,** the threat of multiplicity of prosecutions, if there was such a threat, arises only as a consequence of plaintiff's own deliberate and willful violation of the state law. Surely no plaintiff is entitled to relief from prosecution because, and solely because, he has set in motion a planned scheme to break the criminal law as many times as possible and thus give rise to a threatened multiplicity of criminal actions against him. For a complainant to rest its claim for equity on the magnitude and number of its own wrongs would be strange law indeed.

Cf. **Ex Parte Young,** 209 U. S. 123, 28 S. Ct. 441 (1907), wherein this Court was not convinced that any employee of the railroad could be found who would be willing to violate the criminal law for a test case, and the railroad faced future operational losses on the trains.

Cf. **A. F. L. v. Watson,** 327 U. S. 582, 66 S. Ct. 761 (1946), where the threat to enforce the Florida law was "real and imminent," others similarly situated already having had proceedings brought against them.

When it is realized that there is no loss from operation of the trains the present case is no more than that involved in the **Spielman** case, "the ordinary one of a criminal prosecution which would afford appropriate opportunity for the assertion of appellant's rights."

In effect Southern has asked the federal courts to assume that the pertinent criminal penalty provisions of the Alabama Code (which it really does not seriously attack as unconstitutional) will be enforced against it in an unconstitutional manner.

The federal courts have imposed an impossible dilemma upon the administrative agencies of Alabama. Note the statement of the District Court in the second case, No. 395 (R. p. 53):

> "We are warranted in assuming that should we decline to interfere with the enforcement of the criminal laws of Alabama plaintiff would continue to operate these trains at a serious and growing loss, for while the threat of prosecution may be a goad, it is not the only inducement to law observance. Thus, it is not the threat of a multiplicity of prosecutions, but the finding of irreparable damage to plaintiff's property rights that is real, not fanciful, immediate, not remote, which moves us to grant an injunction. We know of no other manner of affording the relief to which plaintiff is entitled."

The effect of cases Nos. 146 and 395, taken together, is that if a railway operates at a loss, and continues to operate, it may seek relief in federal court on the theory that it is being deprived of property without due process, threatened multiplicity of suits being unavailable as a ground since no criminal law has been broken. Or, the railway may cease to operate, as in case 146, and since taking of property without due process is not properly

available as a ground, there being no losses from operation, await attempt by the Commission to enforce the law and rely on alleged threatened multiple criminal prosecutions. The final result is to take out of the hands of the Commission all authority to keep trains operating and to put into the carrier's hands power to make its own decisions as to what trains it shall run, ex mero motu and ex parte, and then say to the State of Alabama, "make me operate if you can, but do so at your risk for if you try it I'll have a federal suit filed."

II.

The Three-Judge Federal District Court Had No Jurisdiction of This Cause.

The three-judge district court was convened under the provisions of Title 28, U. S. C. 2281. The appellants submit that the case did not meet the jurisdictional requirements of this section and that there was no jurisdiction in a three-judge court, the matter being one within the jurisdiction of a district court of one judge only.

As appellants read Section 2281 there are three requirements which must be met before there is three-judge jurisdiction.

(a) An interlocutory or permanent injunction must be sought.

(b) The injunction must be sought on the ground that a state statute is unconstitutional [**Oklahoma Natural Gas Co. v. Russell**, 281 U. S. 290, 43 S. Ct. 353 (1923) interprets "statute" as including "order."]

(c) The injunction must seek restraint of enforcement, operation or execution of the statute or order

whose constitutionality is attacked. Appellants submit that there can be no real question of this in view of the specific language of the statute: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute (including 'order', since the **Oklahoma** case)— . . . . shall not be granted . . . . upon the ground of the unconstitutionality of **such** statute (including 'order' since the **Oklahoma** case) unless . . ."

Southern's complaint failed to meet requirements (b) and (c) as to any Alabama **statute.** The attack on the constitutionality of Title 48, Sections 35 and 106 of the Code of Alabama 1940, on the ground of unlawful delegation of power was purely colorable (R. p. 2). Southern never contended that there was any merit to this averment, submitted no evidence on it, did not argue it in briefs, and the three-judge court did not even pass on it. Nor did the prayer for relief ask relief from the statutes referred to but purported only to seek relief from the order (R. p. 13).

The complaint did meet requirement (b) as to an **order** of the Commission but it is submitted that it did not meet requirement (c). Relief was not sought in terms of the order but against enforcement of "any penalties or other remedies provided by the laws of the State of Alabama" by reason of plaintiff's or their failure "to restore the operation of said two passenger trains" . . . . as required by the order of December 5, 1949, and "as is inherent" in the order of January 9, 1950 (R. p. 47). This is a much broader field of relief than Section 2281 allows—injunction against "enforcement, operation or execution" of "such statute" (or "such order"). Southern's prayer and the Court's decree would include even common law remedies, and the statutes whose enforcement was sought to be enjoined were not even identified. The Alabama

Supreme Court has held that mandamus is a proper remedy for enforcement of the Commission's orders; apparently this also is included within the injunction.

Ala. Public Service Commission v. Western Union Telegraph Co., 208 Ala. 243, 94 So. 472 (1922).

By statute a state court can hold a violator of the Commission's orders in contempt; this also is enjoined.

Title 48, Section 78, Code of Alabama 1940.

Southern just asked for, and was granted, blanket immunity from any kind of legal process. It is submitted that this is beyond the purview of three-judge court legislation. **Oklahoma Natural Gas Co.** holds that an order can be attacked and relief sought from "such order." It does not hold that the word "such" is to be ripped out of the statute.

The theory of the District Court seemed to be that it could enjoin whatever penalties and remedies, statutory or common law, it saw fit in order to give effective relief as a duly convened court of equity. But this is "bootstrap law," since jurisdiction is conferred initially only if relief is sought from the statute (or order) whose constitutionality is questioned. The three-judge court cannot by the broad scope of its relief confer jurisdiction upon itself retrospectively, if the complaint averred no case quickening the special jurisdiction of the court. The three-judge court is of statutory creation and its jurisdiction is to be strictly limited by the statute which created it and is not to be lightly extended.

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U. S. 386, 54 S. Ct. 732 (1934);
Phillips v. U. S., 312 U. S. 246, 61 S. Ct. 480 (1941).

Also the relief granted, going far beyond that authorized by Section 2281, is exactly the relief prayed for by South-

ern from the beginning. This is no case of equity giving extraordinary relief to make its decree effective where it cannot give that asked, but of equity giving exactly the relief prayed for.

Southern's real complaint is against the statutes (Title 48, Sections 35 and 106). The language of the orders is affirmative in nature but they are merely to require that the trains resume operation and that Southern put itself in compliance with the statutes. As pointed out in Stern & Grossman, **Supreme Court Practice** (Bureau of National Affairs, 1950), pp. 29-30, the three-judge court legislation might have been construed to encompass only those attacks on agency orders which were based on the invalidity of the underlying statute, but the Supreme Court has gone beyond this in the **Oklahoma** case and held an attack on the order alone to be enough. But we are here concerned with a very particular kind of order—not an order which only carries into effect a policy set by statute nor merely recites an administrative determination based on authority conferred by the statute (as the setting of rates in **Oklahoma Natural Gas Co. v. Russell, supra), but with an order whose only purpose and effect is to direct Southern to put itself in compliance with the Alabama statutes.** This was the express purpose of the order of December 5, 1949 (R. p. 36), and as Southern acknowledges, was inherent in the order of January 9, 1950 (R. p. 47).

Southern's case is no more than a contention that a valid statute has been so applied as to deprive it of its property without due process. Suppose a railway filed a petition to discontinue operations of a train, and the Commission simply took no action and issued no order. Could the railroad come before a three-judge court under Section 2281 and get affirmative relief in the form of permission to cease operation, without attacking the constitutionality of the statute which requires continued operation until au-

thority is given to halt? Southern voluntarily assumed the status of operator of a railroad and of operator of the two trains here involved and along with that it subjected itself to the law governing the manner in which it might cease operation once it had obtained a certificate of convenience and necessity. Now it has decided ex mero motu whether it shall cease operation. Obviously there is tremendous danger to orderly supervision of utilities in Alabama if a particular utility can define and decide public convenience and necessity for itself and then seek federal equitable relief because it has been ordered to stop doing so, without seeking judicial examination of the statute which is the crux of the whole matter, i. e., Sections 35 and 106.

The decision below overlooks **Ex parte Bransford**, 310 U. S. 354, 60 S. Ct. 947 (1940), where a distinction is made between the ground of unconstitutionality as applied which requires a three-judge court and the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. Southern has attacked as unconstitutional the result of an administrative act and has not attacked the statute as generally applied to petitions for discontinuance. This case also holds that the three-judge court is not required unless the action complained of is directly attributable to the statute (or, a fortiori, order). Here the penalties and remedies as to which relief is sought are not called for by the order or authorized by it, but in truth and fact are directly attributable only to the statute.

III.

The Federal Courts Should Abstain From Exercising Jurisdiction of Matters Properly Decided by State Courts.

Whether this case was within the jurisdiction of a three-judge court or should have been before a one-judge court, any federal court should have abstained from exercising its jurisdiction on a matter properly decided first by courts of the State of Alabama.

We are concerned with an area where the impact of federal action strikes deep into state affairs. Most exceptional circumstances must exist before the federal judiciary should intervene. There must be a scrupulous regard for the rightful independence of state governments, for the predominant reason behind the three-judge court legislation was a congressional purpose to avoid unnecessary interference with laws of a sovereign state.

Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368, 69 S. Ct. 606 (1949).

And there is likewise a congressional requirement of strict construction to protect the effectiveness of the federal judiciary and the appellate docket of the Supreme Court.

Phillips v. U. S., 312 U. S. 246, 61 S. Ct. 480 (1941); **Stainback v. Mo Hock Ke Lok Po**, supra.

Professor James William Moore is to the same effect:

> "The steady trend of federal legislation has been toward the delimitation of the power of federal courts to interfere with state courts and state action through the equitable writ of injunction

"A parallel tendency to limit federal court interference with state action may be traced in the decisions of the Supreme Court."

Moore, Commentary on the U. S. Judicial Code (Bender, 1949), p. 400.

"It will be seen, therefore, that by statute and decision, the federal judicial power to interfere with the state fiscal, legislative or administrative policy had been restricted within narrow confines, and most of the litigation affecting state fiscal and utility litigation routed up through the state courts, with final appellate review by the Supreme Court of any substantial federal question, instead of allowing it to be instituted initially and proceed in the federal district courts."

Moore, supra, p. 54.

Mr. Chief Justice Stone detailed in **Meredith v. City of Winter Haven**, 320 U. S. 228, 64 S. Ct. 7 (1943), the areas in which a federal equity court may decline to exercise its jurisdiction as relating to state affairs:

State criminal prosecutions.

Collections of state taxes or fiscal affairs of the state.

State administrative function of prescribing local rates of public utilities.

Appointment of a receiver where liquidation of a state bank by a state administrative officer, if no contention that interest of creditors and stockholders will not be adequately protected.

"Similarly, it may refuse to appraise or shape domestic policy of the state governing its administrative agencies."

To this list can be added the following:

Where authoritative state interpretation of a statute will be awaited to avoid possible decisional conflict, especially where the statute is complex.

Where state action will be awaited because a decision on constitutional issues thereby may become unnecessary.

This enumeration is supplemented by various enactments which show the purpose of Congress in this field:

The Johnson Act, carried forward as 28 U. S. C. 1342 et seq., providing against injunction of state rate orders where there is plain, speedy and efficient remedy in state courts.

No jurisdiction in a district court to enjoin, suspend, or restrain assessment, levy or collection of taxes imposed under state law where there is plain, speedy and efficient remedy in state courts (Act of 1937, carried forward as 28 U. S. C. 1341).

See the similar full discussion in Moore, **Commentary on U. S. Judicial Code** (Bender, 1949), pp. 400-402.

We are dealing here with a situation where the federal courts have stepped in to appraise and shape state policy governing its administrative agencies, i. e., the Public Service Commission of the State of Alabama. The two Southern Railway cases are not isolated examples but only the precursors of a steady stream of cases which have been filed in the same federal judicial district with at least two of the same three judges sitting on each case, all concerned with injunctions against enforcement of orders of the Alabama Public Service Commission relating to discontinuance of local train service.

Atlantic Coast Line R. R. Co. v. Ala. Public Service Comm. et al., 92 F. Supp. 579 (Judges McCord, Kennamer and McDuffie);

Louisville & Nashville R. R. Co. v. Ala. Public Service Comm. et al., 93 F. Supp. 544 (Judges McCord, Kennamer and Mize);

Louisville & Nashville R. R. Co. v. Ala. Public Service Comm. et al., Case No. 711-N, U. S. Dist. Ct., Middle Dist. of Ala., set for hearing Jan. 10, 1951 (Judges McCord, Kennamer & Lynne);

Louisville & Nashville R. R. Co. v. Ala. Public Service Comm. et al., Case No. 712-N, U. S. Dist. Ct., Middle Dist. of Ala., set for a hearing Jan. 10, 1951 (Judges McCord, Kennamer and Lynne).

What began as a matter of trains 11 and 16 between Birmingham and Columbus, Mississippi, in the first Southern Railway case, is now a matter of communities all over Alabama being deprived of local train service which they formerly enjoyed, without a single ruling from an Alabama court on whether the Commissioner's definition and application of public convenience and necessity as cast in the mold of Alabama needs and demands is proper and correct and without any decision by an Alabama court on the constitutionality of the pertinent statutes.

In attempting to define and apply the formula of public convenience and necessity to diverse situations in numerous communities and give fair weight to railway income and expense both on local lines and system-wide the Commission is dealing with a problem little less complex than that of oil proration in **Railroad Commission v. Rowan & Nichols Oil Co.**, 311 U. S. 570, 61 S. Ct. 343 (1941), where the Court said of the Texas Railroad Commission (311 U. S., at 575, 61 S. Ct., at 346):

> "Presumably that body, as the permanent representative of the state's regulatory relation to the oil industry equipped to deal with its ever-changing aspects, possesses an insight and aptitude which can hardly be matched by judges who are called upon to intervene at fitful intervals.
>
> "The real answer to any claims of inequity or to any need of adjustment to shifting circumstances is

the continuing supervisory power of the expert commission."

The regulation of local train service within the framework of public convenience and necessity is subject to constant readjustment—rates and returns fluctuate, population shifts, the use of other means of transport varies. The enormous statistical and informational data which is pertinent to a determination of a particular case is in a small way shown by the voluminous exhibits in this case. In reaching a decision the Commission holds open hearings in the affected communities, something a federal equity court cannot do. It is easy to lose sight of the fact that we are dealing with exactly the sort of local matter which is best handled by an administrative agency in close contact with the local scene and best reviewed by a state court.

The **Pullman** case, **Railroad Commission v. Pullman Co.**, 312 U. S. 496, 61 S. Ct. 643 (1941), is almost a touchstone. It holds "decisive" the important considerations of federal-state policy. It points out that a state decision on the matter may mean no constitutional issue will arise. It points out that in Texas (as in Alabama, we interject) there were easy and ample means for testing the administrative agencies' authority through court review. Mr. Justice Frankfurter's conclusion was that, absent a showing that a definitive ruling could not be obtained in state courts with full protection of the constitutional claims, the District Court should stay its hand. Southern does not deny that it has ample review in Alabama courts with full protection of its rights—it simply has chosen to by-pass the local judicial machinery.

Under Title 48, Sec. 76, Code of Alabama 1940, a petitioner before the Commission may apply for a rehearing. Section 79 provides for an appeal from any final action or order of the Commission to the Circuit Court of Mont-

gomery County, in Equity, and thence to the Supreme Court of Alabama. Sections 81 and 84 provide that on such appeal the order appealed from may be stayed or superseded by the appellate court upon hearing and notice after consideration of the testimony taken before the Commission. Section 82 provides that the appellate court shall hear the case upon the certified record and shall set aside the order of the Commission if the court finds that the Commission erred to the prejudice of the appellant's substantial rights in its application of the law, or that the order was based upon findings of fact contrary to the substantial weight of the evidence; also, instead of setting aside the order the court may remand the case to the Commission for further proceedings in conformity with the direction of the Court, and in advance of judgment may remand the case to the Commission for taking of additional testimony or other proceedings. This section has been construed by the Alabama Supreme Court as affording due process under the 14th Amendment to the Constitution of the United States and as to require the appellate court, when confiscation is claimed, to review the order of the Commission both as to the law and the facts on the court's own independent judgment.

Ala. Public Service Comm. v. Sou. Bell Telephone & Telegraph Co., 42 Sou. 2nd 655 (1949);
Ala. Public Service Comm. v. Mobile Gas Co., 213 Ala. 50, 104 So. 538 (1925).

The chief rationale of the **Burford** case, **Burford v. Sun Oil Co.**, 319 U. S. 315, 63 S. Ct. 1098 (1943), is the existence of local issues which must be continuously adjusted by an administrative agency operating at the state level as a "working partner" with the state courts and in terms of state policy (319 U. S. at 332, 63 S. Ct. at 1106):

"Insofar as we have discretion to do so, we should leave these problems of Texas law to the State court

where each may be handled as 'one more item in a continuous series of adjustments.' Rowan and Nichols, supra, 310 U. S. at page 584, 60 S. Ct. at page 1025, 84 L. ed. 1368.

"These questions of regulation of the industry by the State administrative agency . . . so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them. 'Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, * * *. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts "exercising a wise discretion," restrain their authority because of a "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary * * *. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.' Railroad Commission v. Pullman Co., supra, 312 U. S. 500, 501, 61 S. Ct. 645, 85 L. ed. 971.

"The state provides a unified method for the formation of policy and determination of cases by the Commission and by the State courts. The judicial review of the Commission's decisions in the State courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. Cf. Matthews v. Rodgers, 284 U. S. 521, 52 S. Ct. 217,

76 L. ed. 447. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand."

Just as Texas channelled all its oil proration cases through one court in search of uniformity, Alabama channels all its appeals from discontinuance orders through one court, the Circuit Court of Montgomery County.

The principle of local policy was brought out again in the **Stainback** case (336 U. S. at 383, 69 S. Ct. at 614):

> "Entirely aside from the question of the propriety of an injunction in any court, territorial like state courts are the natural sources for the interpretation and application of the acts of their legislatures and equally of the propriety of interference by injunction. We think that where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority unless exceptional circumstances command a different course. We find no such circumstances in this case."

This Court on numerous occasions has had before it the problem of federal courts staying exercise of their jurisdiction pending authoritative interpretation by state courts of a state statute.

Shipman v. DuPre, 339 U. S. 321, 70 S. Ct. 640 (1950);
Watson v. Buck, 313 U. S. 387, 61 S. Ct. 962 (1941);
Railroad Commission v. Pullman Co., 312 U. S. 496, 61 S. Ct. 643 (1941);
Chicago v. Fieldcrest Dairies, 316 U. S. 168, 62 S. Ct. 986 (1942);
A. F. L. v. Watson, 327 U. S. 582, 66 S. Ct. 761 (1946).

This case involves a question of Alabama statutes concerning public convenience and necessity. An interpretation by federal courts is no more than a forecast which may be displaced by subsequent interpretation by state courts in cases of similar factual settings. If the Alabama courts decide differently may Southern then be brought in and its rights relitigated or will it stand alone in contrast to others similarly situated.

In **Shipman v. DuPre**, supra, the Court held:

"Appellants sought a declaratory judgment that certain sections of the South Carolina statute . . . regulating the fisheries and shrimping industry were unconstitutional and interlocutory and permanent injunctions restraining the state officials from carrying out those provisions. The statutory three-judge District Court assumed jurisdiction, decided the issues on the merits, and dismissed the complaint. From the papers submitted on appeal, it does not appear that the statutory sections in question have as yet been construed by the state courts. We are therefore of opinion that the District Court erred in disposing of the complaint on the merits."

In the **Pullman** case Mr. Justice Frankfurter stated (312 U. S. at 499, 61 S. Ct. at 645):

"But no matter how seasoned the judgment of the District Court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the District Court but to the Supreme Court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow

by a state adjudication. Glenn v. Field Packing Co., 290 U. S. 177, 54 S. Ct. 138, 78 L. Ed. 252; Lee v. Bickell, 292 U. S. 415, 54 S. Ct. 727, 78 L. Ed. 1337. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court."

Likewise this Court has made clear its position in the matter of awaiting state action where a decision on constitutional grounds may be avoided. The constitutionality of Sections 35 and 106 and of the several applicable penalty provisions of Title 48 (Sections 110, 399, 400, 405) are questions to be ruled on first by the Supreme Court of Alabama. Such a ruling may end the matter. If under Alabama law the Commission's order was unwarranted under the Alabama standards of public convenience and necessity then the litigation ends. As this Court noted in the **Pullman** case (312 U. S. at 501, 61 S. Ct. at 645):

"If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise."

To the same effect see:

A. F. L. v. Watson, 327 U. S. 582, 66 S. Ct. 761 (1946);
Spector Motor Service v. McLaughlin, 323 U. S. 101, 65 S. Ct. 152 (1944);
Chicago v. Fieldcrest Dairies, 316 U. S. 168, 62 S. Ct. 986 (1942).

The Commission's views on public convenience and necessity, not yet ruled on by the state courts, are pointed up and discussed in greater detail in the brief on Case 395.

CONCLUSION.

It is respectfully submitted that the decree of the District Court should be reversed and the cause ordered dismissed, or that the decree be reversed and the cause

ordered stayed in the District Court pending adjudication in state courts of the issues of constitutionality and statutory interpretation which are involved.

Respectfully submitted,

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I hereby certify that a copy of this brief has this day been served upon Marion Rushton, Esq., of Counsel for Appellee, this the ... day of January, 1951.

.....

Of Counsel for Appellants.

APPENDIX A.

STATUTES INVOLVED.

Title 48, Code of Alabama 1940:

Sec. 35. Abandonment of service, regulated.—No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate.

Sec. 76. Rehearings.—Any time after an order has been made by the commission, any person interested therein may apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing within sixty days after the said application therefor has been filed, and such rehearing shall be subject to such rules as the commission may prescribe. Application for such rehearing shall not excuse any utility or person from complying with or obeying an order of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct. Any order of the commission made after such rehearing shall have the same force and effect as an original order, but shall not affect any right, or the enforcement of any right, arising from or by virtue of compliance with the original order prior to the order made after rehearing.

Sec. 78. Courts may compel compliance with orders of commission and punish failure.—In case of failure or refusal on the part of any person to comply with any valid order of the commission or of any commissioner, or any subpoena, or on the refusal of any witness to testify or answer as to any matter regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of a commissioner, may issue an attachment for such person and compel him to comply with such order, or to attend before the commission and produce such documents and give his testimony upon such matters as may be lawfully required, and the court or judge shall have power to punish for contempt as in cases of disobedience of a like order or subpoena issued by or from such court, or a refusal to testify therein.

Sec. 79. Appeals from orders of commission.—From any final action or order of the commission in the exercise of the jurisdiction, power, and authority conferred upon it by this title, an appeal therefrom shall lie to the Circuit Court of Montgomery County, sitting in equity, except appeals under chapter three of this title, and thence to the supreme court of Alabama. All appeals shall be taken within thirty days from the date of such action or order and shall be granted as a matter of right and be deemed perfected by filing with public service commission a bond for security of cost of said appeal when the appellant is a utility or person, and by filing notice of an appeal when the appellant is the State of Alabama. (1909, p. 96; 1932, Ex. Sess., p. 233.)

Sec. 81. Right to supersede order.—On any such appeal any utility, interested party, or intervenor may supersede any decree rendered by giving such supersedeas bond or bonds as may be appropriate to the proceedings as provided for herein for superseding an order or orders of the commission.

Sec. 82. Proceedings on appeal.—The commission's order shall be taken as prima facie just and reasonable. No new or additional evidence may be introduced in the circuit court except as to fraud or misconduct of some person engaged in the administration of this title and affecting the order, ruling or award appealed from, but the court shall otherwise hear the case upon the certified record and shall set aside the order if the court finds that: the commission erred to the prejudice of appellant's substantial rights in its application of the law; or, the order, decision or award was procured by fraud or was based upon findings of fact contrary to the substantial weight of the evidence. Provided, however, the court may, instead of setting aside the order, remand the case to the commission for further proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing, remand the cause to the commission for the purpose of taking additional testimony or other proceedings. (1932, Ex. Sess., p. 233.)

Sec. 84. Appeal does not supersede order—supersedeas bond.—No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof, upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the appeal be from an order of the commission reducing or refusing to increase such rates, fares, charges, or any of them, or any schedule, or part or parts of any schedule of such rates, fares or charges, the appellate court, or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as a condition precedent to the granting of said supersedeas that the utility applying for the same shall execute and file with the clerk of said court a bond, which bond shall be as hereinafter provided.

Sec. 106. Permit to abandon service.—No transportation company subject to this chapter shall abandon all or any

portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment.

Sec. 110. Repairs and improvements of facilities and property of transportation companies.—If, in the judgment of the public service commission, repairs or improvements to or changes in any trains, switches, terminals, or terminal facilities, motive power, or any other property or device used by any transportation company, subject to the supervision of the public service commission, in or in connection with the transportation of passengers, freight or property, ought reasonably to be made, or that any additions should reasonably be made thereto, in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers, freight, or property, the commission shall, after a hearing had either on its own motion or after complaint filed, make and enter an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein, and every transportation company subject to the supervision of said commission shall make all such repairs, improvements, changes and additions required of it by any order of the commission served on it, and any transportation company that shall fail, refuse, omit or neglect to obey any lawful order or requirement of the public service commission, for which a penalty has not been provided, shall forfeit to the State of Alabama a sum not exceeding two thousand dollars for

each offense, to be fixed by the court or judge trying the case, and every such violation, failure, refusal, neglect, or omission, shall constitute a separate and distinct offense, and, in case of a continuing violation, each and every day's continuance thereof shall be a separate and distinct offense.

Sec. 399. Penalty for charging excessive rates, granting rebates, or violating commission's order, etc.—Any utility doing business in this state, or any of its authorized agents, officers or employees, who is guilty of knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama public service commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed to be a separate offense. (Ib.; 1932, Ex. Sess., p. 209.)

Sec. 400. Violations of statutes as to reasonable rates, adequate service and unjust discriminations; penalty.—Every officer, agent or employee of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corpora-

tion, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court. (1907, p. 23.)

Sec. 405. Violating orders of public service commission; penalty for.—Every officer, agent or employee of any common carrier or corporation, who shall violate, or who procures, aids or abets any violation of, or who shall fail to obey, observe or comply with any order of the public service commission, or any provision of any order of the Commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe any comply with any such order or provision, shall be guilty of a misdemeanor, and upon conviction shall be fined a sum not exceeding five hundred dollars for each offense to be fixed by the court or judge trying the case.

United States Code, Title 28:

Sec. 1253. Direct appeals from decisions of three-judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Sec. 2101. Supreme Court; time for appeal or certiorari; docketing stay.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress,

shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

Sec. 2281. Injunction against enforcement of State statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

Sec. 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by an Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom

shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceedings.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the state.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application

for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days' notice served upon the attorney general of the State.

Reply & Suppl. Brief for the App'lants

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 146.

ALABAMA PUBLIC SERVICE COMMISSION et al.,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

Appeal from the United States District Court
for the Middle District of Alabama.

REPLY AND SUPPLEMENTAL BRIEF FOR APPELLANTS.

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REPLY AND SUPPLEMENTAL BRIEF FOR APPELLANTS.

INTRODUCTORY.

Since the arguments in this reply and supplemental brief apply equally to this case, No. 146, and its companion case No. 395, the appellants herewith address these arguments to both cases. This reply brief contains two basic arguments: I. The suits below in both cases were, in substance, suits against the State of Alabama and barred by the United States Constitution, Amendment XI. II. A further elaboration of the point previously raised that the lower court in both cases should have abstained from exercising any jurisdiction in the causes.

ARGUMENT.

I.

Appellee's Suit Is, in Substance, Against the State of Alabama and Is Barred by the United States Constitution, Amendment XI.

In view of the sweeping nature of the relief granted by the three-judge district court below, appellants now urge that that court should have dismissed appellee's suit as being a suit in violation of United States Constitution, Amendment XI. That amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Appellants did not urge dismissal below on this ground specifically, although appellants' motion to dismiss raised general grounds going to the jurisdiction of the court below to hear and decide the instant cause. However, where objections to a petitioner's suit, as violative of the Eleventh Amendment, were first made and argued in the Supreme Court, after the State Attorney General had appeared in the lower federal courts and defended the suit on the merits, this Court held that the objection and argument had been made in time. **Ford Motor Co. v. Department of Treasury**, 323 U. S. 459, 467 (1945). The rationale of the opinion was that the Eleventh Amendment was an explicit limitation on federal judicial power "of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court" (323 U. S. 467). The Court stated further that the State Attorney General had no authority

to consent that the State's Eleventh Amendment immunity be waived, in the absence of explicit and general statutory authority. Thus, the following argument urging that the court below should have dismissed this cause on Eleventh Amendment grounds is proper and timely.

It is settled that absent explicit consent to suit against it in the federal court, a State may not be sued there without its consent. See: **Ford Motor Co. v. Department of Treasury**, supra; **Kennecott Copper Corp. v. State Tax Commission**, 327 U. S. 573 (1946); **Great Northern Life Insurance Co. v. Read**, 322 U. S. 47 (1944). And, if the State is the real party in interest, a suit against state officers who are merely nominal parties will not avoid the limitations of the Eleventh Amendment. See: **Ford, Read** and **Kennecott** cases, supra.

Another exception to the Eleventh Amendment prohibition occurs where the suit seeks to enjoin state officials from acting under a statute which is allegedly violative of the Federal Constitution. See: **Ex Parte Young**, 209 U. S. 123 (1908). But cf. **Beal v. Missouri Pacific R. Corp.**, 312 U. S. 45 (1941), and **Spielman Motor Sales Co. v. Dodge**, 295 U. S. 89 (1935). The theory of **Ex Parte Young** is that a state officer, seeking to enforce a state act which violates the Federal Constitution, is stripped of his official or representative character, and "is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States" (209 U. S. 160).

Mr. Justice Frankfurter, dissenting in **Larson v. Domestic and Foreign Commerce Corp.**, 337 U. S. 682, 705 (1949), at page 715, has stated:

> "The matter boils down to this. The federal courts are not barred from adjudicating a claim against a

> governmental agent who invokes statutory authority for his action if the constitutional power to give him such a claim of immunity is itself challenged."

Another instance where the Eleventh Amendment will not bar a suit against state officers is present where the state officers have exceeded their statutory authority. Cf.: **Philadelphia Co. v. Stimson**, 223 U. S. 605 (1912). Here, too, the conduct against which an injunction is sought is beyond the official powers of the defendant officers, and is, therefore, not the conduct of the sovereign state. **Larson v. Domestic etc. Corp.**, supra, at p. 690. A commentator has noted:

> ". . . the governing principle, stated generally, is that a suit against an officer, who is proceeding for either of these two purposes (i. e., to collect taxes or to promulgate regulatory administrative action) under an unconstitutional statute or in excess of his statutory authority will not be considered a suit against the government."
>
> Block, **Suits Against Government Officers and the Sovereign Immunity Doctrine** (1946), 59 Harv. L. Rev. 1060, 1076.

Southern, in the case at bar, does not come within exceptions to the limitations of the Eleventh Amendment. Alabama has not consented to be sued. Constitutional attack on the provisions of Title 48, Code of Alabama 1940, is admittedly frivolous. (See discussion in opening Brief for appellants.) Thus, Southern does not come within the exception of **Ex Parte Young**, 209 U. S. 123 (1908).

The state action which Southern seeks to have enjoined in the federal courts is potentially future action, and it is far from certain that such future action will ever be taken by state officers. Southern seeks to have enjoined the Alabama Public Service Commissioners and the Attorney

General of Alabama from proceeding in the name of the State of Alabama to enforce penalties or remedies provided under the laws of the state because of Southern's failure to continue the operation of the two trains in question. It is submitted that such an attack does not bring Southern within an exception to the Eleventh Amendment prohibition. For this potential future action which Southern seeks to have enjoined would be action by the officers as the State of Alabama. These officials would not be acting in their individual capacities.

A case in point is **Chicago R. I. and P. R. Co. v. Long et al.** (8th Cir., 1950), 181 F. 2d 295. Here the plaintiff railroad, a Delaware corporation, sued in the federal district court of Iowa against the chairman and the members of the Iowa State Commerce Commission, among others, for a declaratory judgment that an order of the Commission requiring the railroad to install, maintain and operate certain light and bell signals at a street crossing in a city in Iowa was void. The plaintiff railroad also sought to have the enforcement of the order enjoined as violative of the "due process" and "equal protection" clauses of the Fourteenth Amendment of the Federal Constitution. The Court of Appeals of the Eighth Circuit affirmed the action of the district court in granting the defendant's motion to dismiss the complaint.

The principal discussion in the opinion concerns the propriety of the dismissal on Eleventh Amendment grounds. The Court of Appeals held that the suit was against the State, even though the members of the Iowa Commission were nominal parties defendant. The Court concluded that the State of Iowa was the real party in interest and that the action was, in fact, against the State of Iowa. The Court pointed to the section of the Iowa statute providing that orders of the Commission affecting public rights were to be enforced in the courts of Iowa in the name of

the State of Iowa (181 F. 2d 298). In Alabama, Title 48, Sec. 51, Code of Alabama 1940, provides that, unless otherwise provided, all actions to enforce penalties or forfeitures under the title (the title concerns public utilities and their regulation by the Alabama Public Service Commission) are to be brought in the name of the State in a court of competent jurisdiction in Montgomery County, Alabama. The action for recovery of any penalties is under the direction of the Attorney General [on the matter of the court of competent jurisdiction, compare **Kennecott Copper Corp. v. State Tax Commission,** 327 U. S. 573 (1946), and the Utah Statute involved in that case].

Thus, the reasoning of the Circuit Court of the Eighth Circuit in the **Long** case is apposite in the cases at bar. Clearly, the instant suit is against the State of Alabama and not against the Alabama Public Service Commissioners, and the Attorney General, as individuals stripped of official character.

The Court in the **Long** case, supra (181 F. 2d 295), was unpersuaded by the railroad's argument that the district court had jurisdiction because the order of the Commission deprived plaintiff of property in violation of the Fourteenth Amendment of the Federal Constitution (181 F. 2d 300). The Court stated, adopting the language of prior decisions of the Iowa State courts, that the order did not violate the Fourteenth Amendment since there had been no proceeding to enforce or vacate the order of the Commission.

Similarly, in the case at bar there have been no judicial attempts to enforce or vacate the order complained of. Southern's first steps in No. 146 and in No. 395 were injunction suits in a three-judge federal district court seeking a permanent injunction against the purely negative orders in question, and against the enforcement of Title 48, Code of Alabama 1940 generally. The Alabama Com-

mission had merely denied permission to discontinue a branch line.

It is submitted that the **Long** case, supra, is controlling. Although the decision is a decision of a lower federal court, the decision is a unanimous one, and is based on facts precisely similar to the facts in the cases at bar.

On analysis, it is apparent why an allegation that administrative orders violate the Federal Constitution is not enough to enable a plaintiff to avoid the limitations of the Eleventh Amendment when suing for an injunction in the federal courts against future attempted enforcement of these orders. The rationale that officers acting under an unconstitutional statute were not acting as a sovereign state is founded on the theory that the greater federal constitutional power intervenes and relegates the action of these officers to the status of the action of individuals. In short, the authority for the official action disappeared because that authority was unconstitutional and invalid and thus a nullity. However, the administrative officials at bar do not derive their power to act for a state and as a state from negative administrative actions. And no defendant has commenced enforcement proceedings in the name of the State in the Alabama courts.

A most important feature of the instant litigation demonstrates a basic reason for the existence of the Eleventh Amendment. The three-judge district court at bar has permanently enjoined the administrative officials of Alabama from taking any steps to enforce any orders, penalties or remedies against the Southern, or its officers, agents or employees regarding the discontinuance of and failure to restore the operation of the two lines in question (R. 70 for No. 146, R. 72 for No. 395). No future circumstances which may evolve; no future conditions which may exist in the territories formerly served by those lines; no future need for rail transportation along these lines in the territories

served, however great the potential patronage may be; no future burden which may be imposed on the state government or the federal government and the citizens thereof, because the lines in question have been discontinued; none of these factors will enable the State of Alabama and its administrative officials to take any action with regard to these lines. A permanent injunction stands. A greater or more undue interference with the functions and operations of state government is difficult to conceive.

> "Various reasons have been advanced from time to time in justification of denying jurisdiction to the courts in cases against sovereign states . . . . This brings us to the final explanation and the only one that seems worthy of consideration as a real policy basis for the doctrine of sovereign immunity today: it is possible that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property" (Block, **Suits Against Government Officers and Sovereign Immunity Doctrine**, supra, pp. 1060-1061).

Appellee Southern has not objected at any time during the course of this litigation to the state review procedures. The Alabama legislature, as a matter of public policy, has restricted the scope of review of the Commission's action. (See Title 48, Sec. 82, Code of Alabama 1940.) The Circuit Court may do only three things: (1) Affirm the order of the Commission; (2) set aside the order of the Commission; (3) remand the case to the Commission for further proceedings in conformity with the directions of the court. Title 48, Sec. 82, supra; **Avery Freight Lines v. Persons**, 250 Ala. 40, 32 So. 2d 886 (1947).

The Alabama legislature obviously intended to give great weight to the findings and orders of the Commission. The

Alabama legislature refused to allow the courts to substitute an independent judgment for that of the Commission. Nevertheless, this carefully devised legislative plan has been completely destroyed by the opinions and holdings of the two three-judge courts from which the instant appeals have been taken. If this Court affirms the decisions below, the field of operation for the Alabama administrative procedure just described will be virtually eliminated. There is no question that the courts below have substituted very severe independent judgments for the judgments of the Commission. Surely, if the Eleventh Amendment is to retain its efficacy, it should apply in the cases at bar.

A further policy reason exists which militates toward a reversal of the decisions below on Eleventh Amendment grounds. In order to sustain the action of the lower court from Eleventh Amendment attack, the so-called "stripping doctrine" of **Ex parte Young**, 209 U. S. 123, supra, must be invoked. **Ex parte Young** set out this doctrine where a statute was unconstitutional. The doctrine is certainly dangerous to state officials, since they may be liable in damage suits and in suits under the Federal Civil Rights Act (8 U. S. C. A., Sec. 43) for enforcing a statute as a matter of duty, which is later held unconstitutional. Certainly, **Ex parte Young** goes far enough. Its doctrine should not be extended to negative quasi-judicial orders of administrative bodies which are alleged to be violative of the Federal Constitution.

For the reasons set out in this section of the brief it is apparent that the instant suits are, in substance, actions against the State of Alabama, and as such, are barred by the Eleventh Amendment to the Federal Constitution. The three-judge district courts below erred in failing to dismiss the suits on that ground.

II.

The Lower Court Should Have Abstained From Exercising Jurisdiction in the Cause at Bar.

Without waiving the argument in the preceding section of this reply Brief, the appellants contend that the lower court should have abstained from exercising any jurisdiction which it may have possessed, until the cause had been litigated in the courts of Alabama pursuant to Tit. 48, secs. 79 et seq., Code of Alabama 1940. Although this proposition has been argued in the original Briefs filed in No. 146 and in No. 395, appellants will now seek to expand that argument in reply.

The lower court in No. 395 did not follow significant decisions of this Court holding that lower Federal courts should not exercise their jurisdiction in cases such as this until there had been adjudication in the State courts (R. 51):

Shipman v. Dupre, 339 U. S. 321 (1950);
Railroad Comm. of Texas v. Pullman Co., 312 U. S. 496 (1941);
Burford v. Sun Oil Co., 319 U. S. 315 (1943);
Stainback v. Mo Hock Me Lok Po, 336 U. S. 368 (1949);
Chicago v. Fieldcrest Dairies, 316 U. S. 168 (1942);
AFL v. Watson, 327 U. S. 582 (1946);
Hillsborough v. Cromwell, 326 U. S. 620 (1945).

The lower court felt that all these cases were distinguishable at bar as involving situations where the state law was "novel, ambiguous or undecided" (No. 395, R. 51). The lower court observed, on the other hand, that "defendants cite no ambiguous, novel or undecided State law involved herein" (No. 395, R. 52). Further: "The Alabama law requires no definitive construction of authori-

tative interpretation. **Alabama Public Service Commission v. Atlantic Coast Line R. Co.**, supra" (No. 395, R. 52).

Two basic errors are apparent. First, Alabama law on the subject, as set forth in **Alabama Public Service Comm. v. Atlantic Coast Line R. Co.**, 253 Ala. 559, 45 So. 2d 449 (1950), is not so clear and unambiguous as applied to the situations at bar. Second, the cases of this Court are not susceptible of such easy grouping. Mr. Justice Frankfurter, the author of **Railroad Comm. v. Pullman Co.**, supra, dissented in **Burford v. Sun Oil Co.**, supra, on the ground that the latter went beyond the former, and went too far. Thus, it is reasonable to assume that novelty and ambiguity in State law are not absolute prerequisites under the **Burford** rule. This Court there invoked abstention out of deference to the State administrative process. (See: Braucher, **The Inconvenient Federal Forum** [1947], 60 Harv. L. Rev. 908, 923; and Note 56 Harv. L. Rev. 1162.)

The lower court in No. 395 decided, as conclusions of law, that the Commission's order violated the Fourteenth Amendment of the Federal Constitution as a confiscatory order (R. 70), and that there was no imperative duty under Alabama law requiring continued operation of the branch line (R. 69). Nevertheless, the lower court made no finding as to the effect of the overall system profits and losses on the situation at bar. But, the Alabama case of **Alabama Public Service Comm. v. A. C. L. R. Co.**, 253 Ala. 559, 45 So. 2d 449 (1950), clearly distinguished a "due process" case (where system profits require continuance) from an Alabama "public convenience and necessity" case (where the carrier is **not** required to show that the rate of return on the system militates toward a reduction in service). Therefore, the Alabama Supreme Court, without having considered burden on the system as a whole, would not have decided the instant cases on Fourteenth Amendment grounds. Yet, the lower court, apparently applying settled and "unambiguous" Alabama law, de-

cided these cases on BOTH "convenience and necessity" and "due process" grounds.

The error in applying, as settled Alabama law, the general statements and dicta of the **Atlantic Coast Line** case, supra, does not end here. That case held that the railroad involved might **not** curtail its branch line service. Consequently, no settled and unambiguous Alabama law stems from a holding in accord with the holdings of the lower courts in the cases at bar (Nos. 146 and 395). Also, even if dictum is to become settled law, certain factors important in the **Atlantic Coast Line** decision were not considered in the instant cases. There is no comment below concerning the possibility of an increased rate structure; there is no finding as to possibilities of economy. Yet the Alabama court stated:

> "If petitioner is unable to secure redress before the commission in the matter of its rate structure here applicable and to make available economies so as to provide a net profit, the remedy is not to shift its effect to a reduction of this service, so long as the entire system as a whole would not be materially affected by a continuance of the service, and the inconvenience of one would offset the burden of the other" (253 Ala. 564, 45 So. 2d 453).

The second error of the lower court, as exhibited in its opinion in No. 395, is its failure to observe the difference between **Pullman**, 312 U. S. 496, and **Burford**, 319 U. S. 315. Even if Alabama law were not in doubt, **Burford** does not make novelty and ambiguity in State law a requirement for the doctrine of abstention. The principal emphasis in **Burford** concerns non-interference with carefully devised legislative schemes of administrative policy and procedure.

> "The State provides a unified method for the formation of policy and determination of cases by the Com-

mission and by the State courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here . . . (citation) . . . . Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand."

(**Burford v. Sun Oil Co.**, 319 U. S. 315, 333-334.)

Conflicts "dangerous to the success of state policies" have certainly resulted from the intervention of the lower federal court in the case at bar. It has issued permanent injunctions against action by Alabama administrative officials regarding the railroad lines here involved. No conceivable changed circumstances would mitigate a contempt citation if Alabama administrative officials took such future action. The lower court has substituted its independent judgment for that of the Alabama Commission. Yet, the Alabama legislature, in a carefully devised regulatory scheme, had severely limited the scope of the review which the Alabama courts may exercise over actions of the Alabama Public Service Commission. See: Tit. 48, Secs. 79 et seq., Code of Alabama 1940; **Avery Freight Lines v. Persons**, 250 Ala. 40, 32 So. 2d 886 (1947); **Alabama Public Service Comm. v. Atlantic Coast Line R. Co.**, 253 Ala. 559, 45 So. 2d 449 (1950). And neither the appellee, Southern, nor the lower court has attacked the Alabama review procedures as inadequate.

The **Burford** case, 319 U. S. 315, requires reversal of the action of the lower courts in the cases at bar, for the clear purpose of that case is to restrain the exercise of federal

jurisdiction where a policy-administering function of a state court is to be protected. See: 56 Harv. L. Rev. 1162, 1163 (1943).

The instant decisions of the lower court are fraught with difficulties. Of foremost importance is the fact that administrative actions as to the lines in question are completely and permanently stultified, the most extreme changed circumstances in the area notwithstanding. Furthermore, there is certainly a possibility that the Alabama courts might reach a decision, in a similar factual setting, different from the decisions reached by the lower court. Then, a distinct dualism would exist concerning administrative policy toward discontinuance of branch railroad lines.

The lower court has sat in judgment on the entire legislative scheme for the regulation of public service companies. And the Alabama courts have had no opportunity to participate in such judgment, even though the Alabama legislature had made its courts an integral part of the scheme. There is always potential friction between state policy and the federal judiciary. Alabama, through its statutes and its Commission, has developed a well-defined policy toward the discontinuance of railway lines. The permanent injunctions in the lower court have made this potential friction a reality. For the lower court has become the architect of Alabama domestic policy concerning railroads and other public service corporations. (The impact of the decision below obviously extends beyond discontinuance of branch railroad lines.)

Appellants submit that the doctrine of forum non conveniens, developed to accommodate private litigants, witnesses and jurors, should make this case an a fortiori one. That doctrine has now been adopted by Congress. 62 Stat. 937, 28 U. S. C. A., Sec. 1404 (a). See: **Ex parte Collett**, 337 U. S. 55 (1949), and cf. **Missouri ex rel. Southern Ry.**

Co. v. Mayfield, . . . U. S. . . ., . . . S. Ct. . . ., 95 L. ed. (Adv. Op.) 6 (1950). This Court, indeed, has analogized the **Pullman** and **Burford** doctrines to forum non conveniens:

> "On substantially forum non conveniens grounds we have required federal courts to relinquish decision of cases within their jurisdiction where the court would have to participate in the administrative policy of a state. **Railroad Commission v. Rowan & Nichols Oil Co.**, 311 U. S. 570; **Burford v. Sun Oil Co.**, 319 U. S. 315; but cf. **Meredith v. Winter Haven**, 320 U. S. 228."
>
> (**Gulf Oil Corp. v. Gilbert**, 330 U. S. 501, 505 [1947].)

Certainly the public policy involved where the federal courts have interfered with state administrative policy and procedure should appeal more strongly to this Court than the inconvenience of a particular forum to litigants and witnesses.

> "In **Gulf Oil Corp. v. Gilbert**, Mr. Justice Jackson repeated his extrajudicial statement that such cases were decided on 'substantially' forum non conveniens grounds. But dismissal or stay of suits in equity, where such suits threaten grave interference with state governmental activity, does not involve geographical convenience, for the Court has expressly recognized that greater discretion to withhold relief exists where public interest is involved than where only private interests are in issue. Some of the decisions are adequately explained by the Supreme Court's reluctance to decide constitutional questions unnecessarily. Others have been treated as refusing 'an extraordinary remedy' because of 'considerations of policy,' thus suggesting that the remedy rather than the forum was deemed inappropriate."
>
> (Braucher, **The Inconvenient Federal Forum** [1947], 60 Harv. L. Rev. 908, 923 f.)

Powerful policy considerations dictate a reversal of the lower court on the ground that it should have withheld the exercise of such equity jurisdiction as it might have had.

This Court in the **Pullman** case, the **Burford** case and in **Meredith v. Winter Haven**, 320 U. S. 228, 235 (1943), as well as in other cases, has enumerated many instances where a federal court should stay its hand. A recent decision of the Court of Appeals for the Third Circuit has recognized the "delicate matter of the balance between state and national authority." **Cooper v. Hutchinson** (3rd Cir., 1950), 184 F. 2d 119, 124 f. In that case the presiding judge at a murder trial in New Jersey, after having granted admission of out-of-state counsel to defend the appellants, withdrew permission for the out-of-state counsel to be admitted pro hac vice. The appellants then sought an injunction in the federal district court under the Civil Rights Act (8 U. S. C., Sec. 43), alleging that the trial judge had arbitrarily denied to them counsel of their own choice, and asking that the trial judge be prohibited from taking further action until the out-of-state counsel had been readmitted. The defendant judge's motion to dismiss was granted by the district court on the ground that the complaint alleged no basis for equitable jurisdiction. On appeal, the instant case held that the district court should retain jurisdiction **pending determination of appellant's rights by the New Jersey courts.**

Appellants insist again that the lower courts erred in refusing to invoke the doctrine of abstention in the cases at bar.

CONCLUSION.

It is respectfully submitted that the decrees of the district court in both cases, No. 146 and No. 395, should be reversed and the causes ordered dismissed; or, in the alternative, that the decrees should be reversed and the

causes remanded with orders that the district court stay the causes pending adjudication in the State courts of the issues of constitutionality and statutory interpretation which are involved.

Respectfully submitted,

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I hereby certify that a copy of this brief has this day been served upon Marion Rushton, Esq., of Counsel for Appellee, this the .... day of February, 1951.

.....

Of Counsel for Appellants.

IN THE

Supreme Court of the United States

October Term, 1950

No. 146

ALABAMA PUBLIC SERVICE COMMISSION, ET. AL., *Appellants*,

v.

SOUTHERN RAILWAY COMPANY, *Appellee*.

BRIEF FOR SOUTHERN RAILWAY COMPANY.

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TABLE OF CASES.

CONSTITUTION AND STATUTES.

IN THE

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No. 146

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v.

SOUTHERN RAILWAY COMPANY, *Appellee*.

BRIEF FOR SOUTHERN RAILWAY COMPANY.

OPINION BELOW.

The opinion of the specially constituted three-judge United States District Court, for the Middle District of Alabama, Northern Division thereof (No. 645-N), appears in the record at pages 63-69, and is reported in 88 F. Supp. 441. The final decree appears at pages 69-70 of the record.

The report and order of the Alabama Public Service Commission, which gave rise to the proceedings in the District Court, appear at pages 55-63 of the record.

A chronological history of the litigation is submitted herewith as Appendix C, pages 38-41.

JURISDICTION.

This is a direct appeal authorized under the Act approved June 25, 1948, effective September 1, 1948, Title 28, U. S. Code, Section 1253.

The suit was brought in the district court under the provisions of the Act of June 25, 1948: 28 U. S. C., Sections 1331; 1332, 2281, and 2284.

STATUTES INVOLVED.

28 U. S. C., Sections 1253, 1331, 1332, 2281, 2283, and 2284.*

Alabama Code 1940, Title 48, Sections 17, 79, 81, 82, 84, 85, 86, 87, 88, 89, and 106.*

Constitution of the United States, Amendment XIV, Section 1, and Commerce Clause Article I, Section 8, Clause 3.

STATEMENT OF THE CASE.

September 13, 1948, Southern Railway Company filed a petition (R. 14) in compliance with the requirement of Alabama statutes, Title 48, Section 106, Code of 1940, with Alabama Public Service Commission (Docket No. 12221), seeking authority to discontinue operation of two passenger trains Nos. 11 and 16 which it had for many years operated daily between Birmingham, Ala., and Columbus, Miss., in so far as their operation took place within the State of Alabama, to-wit, 113 miles in each direction.[1]

The ground for this application was the disparity between revenues and costs of operation because of small public patronage due to motor car operation, public and private, over improved highways—showing the lack of public need for such rail service. The petition recited that

* Set out in Appendix A, pages 34-35, and Appendix B, pages 35-38.

[1] The operation in Mississippi was between Steens and Columbus, a distance of about 10 miles. These trains not having been established in compliance with any order of Mississippi Railroad Commission, it was unnecessary for railway to seek authority from Mississippi Railroad Commission to discontinue their operation.

the wages of the crews, and payroll taxes thereon for the benefit of the crews, and train fuel consumed, approximated the total gross revenues from the trains' operations, and with other direct expenses considered, the direct costs alone exceeded the total revenues by over $5,000 per month. (R. 18.) No action was taken by the Commission on this petition for over one year.

October 26, 1949, these trains were discontinued in compliance with Service Order No. 843, issued by Interstate Commerce Commission, October 21, 1949, to all railroads to reduce their coal-burning passenger locomotive miles twenty-five per cent to meet the locomotive fuel shortage due to a strike in the coal industry (R. 19).

November 10, 1949, Southern Railway filed its supplemental petition with Alabama Public Service Commission seeking authority from it not to restore operation of these trains (R. 21) and representing to the Commission therein that in their continued operation the disparity between total revenues and direct costs had widened to over $9,000 per month (R. 25).

Southern Railway advised Alabama Public Service Commission that six other trains, which it had discontinued under Service Order 843, would be restored on November 21 (R. 28). That was the effective date of revocation of Service Order No. 843. And the Railway urged a hearing on its supplemental petition not to restore trains 11 and 16. Alabama Commission advised the Railway that a hearing on the original and supplemental petitions (Docket 12221) had been assigned for Fayette, Ala., December 8, 1949, but would not be held unless trains 11 and 16 were restored.

November 22, 1949, Alabama Commission issued its order (Docket 12225) citing Southern Railway to show cause why trains 11 and 16 should not be restored (R. 31). Southern appeared in response to the citation, and offered evidence which was rejected (R. 6, 7). On December 5, 1949, the Commission entered its order (Docket 12225) commanding Southern to restore operation, calling its attention to the penalties provided under state statute for noncompliance,

and providing therein that unless Southern purged itself of the alleged contempt it would be optional with the Commission whether it would hear the original and supplemental petitions at Fayette, Ala., on December 8 (R. 33).

December 6, 1949, Southern filed its bill in United States District Court. On that date the court entered its order temporarily restraining the Commission and the Attorney General from compelling restoration of the trains (R. 40).

December 8, 1949, the original and supplemental petitions (Docket 12221) were heard before the Commission at Fayette, Ala. On January 9, 1950, the Alabama Commission entered its report and order in said docket denying the applications to discontinue operation (R. 55).

The hearing on the bill for temporary and permanent injunction was set for hearing before the three-judge district court on December 15 (R. 42). At the request of defendants it was reassigned to January 9, 1950, and to January 12, on which date it was heard.[2] Final decree was entered February 13, 1950, permanently enjoining the Commission, its members, and the Attorney General from taking any proceedings to enforce the provisions of the Commission's orders of December 5, 1949, or January 9, 1950, or any penalties or other remedies against the plaintiff, its officers, agents, or employees, account failure to observe said orders, or either of them, by failure to restore said trains (R. 69). That is the decree from which defendants below take their appeal to this Court.[3]

ARGUMENT.

In their brief appellants argue three points: I. A federal court should decline to enjoin enforcement of the criminal laws of the State of Alabama. II. The three-judge federal district court had no jurisdiction of this cause. III. The

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[2] In the meantime the Interstate Commerce Commission issued Service Order No. 845 calling on all railroads to curtail coal-burning passenger locomotive miles 33⅓ per cent effective January 5 to March 8, 1950, unless sooner revoked.

[3] A full chronological history is shown in Appendix C hereto.

federal courts should abstain from exercising jurisdiction of matters properly decided by state courts. We address our argument to those three points, in order, treating all others not argued in the brief as waived by appellants.[4]

I.

Appellants' Contention Here that the United States Court Should Not Enjoin Enforcement of the Criminal Laws of the State of Alabama, is Unsound and Without Merit.

We submit the district court properly exercised its jurisdiction in the case at bar and entered its decree permanently enjoining the defendants as prayed in the complaint, as amended. It was necessary under the Alabama statutes for appellee to file its application with the Alabama Commission for authority to discontinue operation of these two trains. Appellee does not challenge that requirement. The Commission, before hearing the application and the supplemental application, preemptorily ordered appellee to restore operation, which had been discontinued in compliance with an order of the Interstate Commerce Commission. Under the Alabama statutes the orders of the Public Service Commission are not self-executing, resort to the courts is necessary and, in the main, enforcement is provided by the Alabama statutes in the way of penalty provisions: Title 48, Alabama Code 1940, Sections 110, 399, 400, 405, and others.

These penalties have never been collected so far as we can find from a search of precedents in Alabama by criminal proceedings upon indictment and information but have been collected solely by civil procedures. *State* v. *Western Union Telegraph Co.*, 208 Ala. 228, 94 So. 466. *Alabama Public Service Commission* v. *Western Union Telegraph Co.*, 208 Ala. 243, 94 So. 472. The language of

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[4] *Flournoy* v. *Wiener*, 321 U. S. 253, 261 (1944). *Uric* v. *Thompson*, 337 U. S. 163, 196 (1949).

the statute contemplates this result, Section 51, Title 48, Code of Alabama, 1940.[5]

Sections 400 and 405 run against officers, agents, or employees of the railroad. Section 399 runs against both the railroad and its officers, agents, or employees. Section 110 provides for penalty solely against the railroad for a violation of the Commission's orders.[6] This shows the extent to which the state has gone by providing a penalty to cover anything possibly overlooked.

We submit that the penalties designed by the state to compel compliance with orders of its Public Service Commission are not criminal statutes in the common acceptation of the word. They are, at best, mere quasi-penal statutes. They are more remedial than penal.[7] Certainly reference therein to "misdemeanor" which might be taken to contemplate imprisonment in the common jail, as distinguished from "felony" where imprisonment is to be in the state penitentiary, could not be held applicable to a transportation company such as the appellee here. Appellee could not be imprisoned in the common jail. Hence the only method of penalty compulsion is by so-called penalty statutes, that is to say, by a fine assessed against the transportation company for non-compliance with the Commission's order. This, therefore, does not present a case of enjoining the

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[5] Title 48, § 51, Code of Alabama, 1940, provides:

"*Actions to enforce penalties or forfeitures.*—Unless otherwise in this title provided, all actions to enforce penalties or forfeitures under this title shall be brought in the name of the State of Alabama in a court of competent jurisdiction in Montgomery county, Alabama. Whenever any utility is subject to a penalty or forfeiture under this title, the commission shall certify the facts to the attorney general, who shall institute and prosecute an action for recovery of such penalty; provided, the commission may compromise such action and dismiss the same on such terms as the court will approve. All penalties and forfeitures recovered by the state in such actions shall be paid into the treasury to the credit of the general fund."

[6] Section 110:

"* * * any transportation company that shall fail, refuse, omit or neglect to obey any lawful order or requirement of the public service commission, for which a penalty has not been provided, shall forfeit to the State of Alabama a sum not exceeding two thousand dollars for each offense, to be fixed by the court or judge trying the case, and every such violation, failure, refusal, neglect, or omission, shall constitute a separate and distinct offense, and, in case of a continuing violation, each and every day's continuance thereof shall be a separate and distinct offense."

[7] *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 17 (1904).

prosecution of the criminal laws of the state as criminal laws are generally understood, but merely of money judgments for continuous penalties.

Upon denial of its application to discontinue these trains appellee was confronted with two courses: Comply by restoring the operation of the trains, or, failing to do that, suffer the penalties of the Alabama statutes. In the one instance the loss from operation already was large and was growing larger; in the other the amounts of the numerous penalties were large and each day was by statute made a separate offense. Furthermore, in so far as the sections run against the officers, agents, or employees of appellee, we stress the fact that such persons are engaged in the public service of operating a railroad in the public interest. Interference with them in the performance of their duties would obviously handicap the conduct of appellee in performing its duty in the public service. Whether the financial loss is viewed from the standpoint of losses of operation or the large and increasing penalties, appellee's property would be taken upon its failure to comply with the Commission's order in violation of the guarantees contained in the Fourteenth Amendment to the Constitution of the United States and subject appellee, its officers, agents, and employees, to a multiplicity of suits.

In *St. Louis, S. F. Ry. Co.* v. *Alabama Public Service Commission*, 279 U. S. 560 (1929), this Court considered an appeal from a three-judge district court from the same Middle District of Alabama as in the case at bar. In that case the railway had discontinued operation of two interstate passenger trains without preliminary authority therefor from the state commission. A restraining order was issued upon the filing of the bill and was continued in force pending the appeal whereunder the state authorities were enjoined from the commencement of proceedings to enforce the penalties prescribed in the state statutes,—the same state statutes as in the case at bar. Injunction was denied, but the restraining order was continued in effect, and so, even after this Court vacated the decree and remanded the

case to the lower court. The opinion concluded with the statement that if after hearing, the state commission should insist that the service be restored, further proceedings appropriate to the situation might be had in the cause in the district court. This case has never been over-ruled.

In No. 395, October Term, 1950, *Alabama Public Service Commission, et al.* v. *Southern Railway Company,* a companion case to the case at bar, a three-judge court passed upon this same contention of appellants. *Southern Railway Company* v. *Alabama Public Service Commission,* 91 F. Supp. 980. At page 986, Judge Lynne, delivering the unanimous opinion of the District Court, said:

> "Equally tenuous is defendants' contention that the injunction prayed for would restrain enforcement of the criminal laws of Alabama in an unwarranted manner. To impart reality to the protection afforded plaintiff by the Fourteenth Amendment it is essential that this court restrain defendants from seeking to impose the sanctions of fines, penalties and forfeitures provided in Title 48, Code of Alabama 1940. We are without jurisdiction to grant the relief which the Commission wrongfully withheld, namely, permission for plaintiff to abandon these train services. We are warranted in assuming that should we decline to interfere with the enforcement of the criminal laws of Alabama plaintiff would continue to operate these trains at a serious and growing loss, for while the threat of prosecution may be a goad, it is not the only inducement to law observance."

In the opinion Judge Lynne distinguished *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45 (1941), heavily relied upon by the Alabama Commission, pointing out that in the *Southern Railway case* (No. 395), there was no waiver of multiplicity of suits as there was in the *Beal case*. So it is in the case at bar, appellee has alleged multiplicity of suits from which it appropriately seeks injunctive relief. After thus distinguishing the *Beal case*, Judge Lynne stated the view of the three-judge court on the point in question as follows (91 F. Supp. at 987):

"We hold that this case falls within the exception to the general rule and find apposite the following language in Cline v. Frink Dairy Co. (1927), 274 U. S. 445, 47 S. Ct. 681, 682, 71 L. Ed. 1146: '* * * The general rule is that a court of equity is without jurisdiction to restrain criminal proceedings to try the same right that is in issue before it; but an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate. * * *,'" (Authorities omitted).[8]

Three-judge federal courts have unhesitatingly granted injunctive relief against state penalties designed to enforce compliance with the orders of state regulatory commissions in those cases where they have determined such orders violated constitutional guarantees. Some of the more recent decisions are listed in Appendix D hereto.

If appellee is not entitled to injunctive relief against the enforcement of the threatened penalties under the Alabama statutes then it has no remedy by which to seek protection from invasion of its constitutional rights. Even if it is entitled to supersedeas under the statutes of Alabama, whether Section 81 or Section 84 of Title 48, such supersedeas would merely postpone the evil day so far as payment is concerned. The supersedeas provided under Alabama statutes is in no sense a guarantee of immunity from the accrual of penalties during the period of appeal, but simply gives to the state additional security for the collection of such penalties as were continuously accruing under the theory of appellants.

The authorities cited by appellants in support of this, their Point I, do not support appellants contention. *Beal* v. *Missouri Pacific*, 312 U. S. 45 (1941), was a suit by a

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[8] *Fenner* v. *Boykin*, 271 U. S. 240, 243. *Packard* v. *Banton*, 264 U. S. 140. *Hygrade* v. *Sherman*, 266 U. S. 497, 502. *Terrace* v. *Thompson*, 263 U. S. 197, 214. *Ex Parte Young*, 209 U. S. 123. *Davis* v. *Los Angeles*, 189 U. S. 207, 218. *Dobbins* v. *Los Angeles*, 195 U. S. 223, 236. *In re Sawyer*, 124 U. S. 200, 209.

railroad to enjoin a county attorney from prosecuting plaintiffs agents for criminal violations of the Nebraska full train crew law. The district court found only one suit was contemplated. This Court could not say that one suit threatened irreparable injury. We quote in the footnote below.[9] From the foregoing it thus clearly appears that the issue of irreparable injury from a threatened multiplicity of suits was waived. In the case at bar multiplicity of suits is one of the grounds for relief set forth in paragraph 17 of the complaint, and not waived.

Watson v. *Buck*, 313 U. S. 387 (1941), is different from the instant case in that the complainants there by seeking to enjoin the enforcement of two entire acts containing many separate and distinct regulations, commands and prohibitions, were asking the court to pass on the constitutionality of separate phases of the comprehensive statute before it was faced with cases involving particular provisions as specifically applied to persons who claim to be injured. There was no threat of prosecution (with one exception dealt with separately) found in the record or by the lower court.

In *American Federation of Labor* v. *Watson*, 327 U. S. 582 (1946) this Court ordered that the cause be remanded to the district court with directions to retain the bill pending determination of proceedings pending at the time in the Florida courts which might resolve the doubts sought to be determined in the Federal Court. In the instant case there is no state court action pending.

Douglas v. *City of Jeannette*, 319 U. S. 157 (1943), a Jehovah's Witness case, involved a municipal ordinance requiring a license before distributing pamphlets, and *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89 (1935), involved New York State's Code of Fair Competition in the Auto Industry. In the last-named case there was a disclaimer on

[9] "The majority of the Court are of opinion that in view of the *record and certain concessions made by counsel on the argument here any further hearing of the issue of irreparable injury to respondent from a threatened multiplicity of suits has been waived.*" (Emphasis supplied.)

the part of the District Attorney, as state prosecuting officer, of any intention of instituting more than a single prosecution.

Throughout these cases, this Court approved injunctions in the federal courts in cases of exceptional circumstances and a clear showing that an injunction is necessary to afford adequate protection of constitutional rights and of immediate danger of irreparable loss. We submit in the case at bar those tests have been squarely met. Loss, whether from enforced operation or from penalties, or multiplicity of suits, was undoubtedly imminent, to say nothing of mandamus proceedings, or even proceedings for contempt. The Attorney General of the State of Alabama is the law enforcement officer, and, indeed, the attorney for the Public Service Commission. Upon taking his oath of office he undoubtedly swore to uphold the law. "As long as there is an Attorney General in the State, the threat of prosecution is always present, and the injury, if any, resulting therefrom is always impending."[10] If therefore the laws of Alabama contemplated action by him to enforce the orders of the Commission a fair presumption is that he would do his duty.

But if it is thought that is not enough, we point here to the specific threat that the Commission would invoke sanctions of penalties because in its order of December 5, 1949, it specifically referred to penalties and made its position clear. Again the Commission was unwilling to grant appellee a hearing on its petitions until appellee had restored operation of the trains in question. Finally, appellee was notified by the State Commission that until appellee had purged itself of contempt it was optional with the Commission whether appellee would be heard on its original and supplemental petitions. One can hardly imagine a clearer case of imminent danger of irreparable injury and definite threat on the part of the state to invoke a multiplicity of suits for penalties and otherwise. The whole attitude of the

[10] *Atchison, Topeka and Santa Fe* v. *La Prade*, 2 F. Supp. 855.

State Commission throughout the handling of this case shows it was in no friendly mood toward appellee and that whatever step appellee took might be said to be taken at its risk of dire punishment at the hands of the state authorities.

Appellee could not dare to fail to comply with the State Commission's order and without taking affirmative action permit the heavy penalties to run against it day by day in the face of a well-reasoned decision of this Court. We refer to *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651 (1915). The railway there failed to comply with the order of the state commission. The state sued under its penalty statute and recovered judgment despite the railway's defense on constitutional grounds that the order was void. In affirming the penalty judgment against the railway this court said, at page 669:

> "If the Wadley Southern Railroad Company had availed itself of that right and—with reasonable promptness—had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If in that proceeding, the order had been found to be valid, the carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order—though not so in respect of violations prior to such adjudication.
>
> "But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful."

That was a unanimous decision of this Court, and has never been overruled. In the face of this Court's decision in the *Wadley Southern case*, appellee Southern Railway

would have been reckless, to say the least, had it adopted the course appellants here contend it should have taken, that is, wait until sued for the penalties before taking steps to determine the validity of the State Commission's action in denying appellee's application to discontinue operation of these unprofitable passenger trains.

II.

Appellants' Contention that the Three-Judge United States District Court Had No Jurisdiction of This Cause Is Unsound and Without Merit.

We submit that the Court was properly convened, assumed jurisdiction, heard and determined this cause, under authority of 28 U. S. C., Sections 1331, 1332, 2281, and 2284.[11]

The amendment of 1913 to Section 266 of the Judicial Code, now Section 2281 of 28 U. S. C., added the clause "an order made by an Administrative Board or Commission acting under state statutes" but left the words "unconstitutionality of such statute" as written. The decision in *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290, 292 (1923), removed all doubt by placing an order of such Administrative board in the same status, so far as that section of the law is concerned, as any statute of a state.[12] Far from

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[11] Set out in Appendix A, page 34-35.

[12] "A doubt has been suggested whether these cases are within § 266 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1087, 1162; as amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a State, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State' but did not change the statement of the ground, which still reads 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this Court has assumed repeatedly that the section was to be taken more broadly. *Louisville & Nashville R. R. Co.* v. *Finn*, 235 U. S. 601, 604. *Phoenix Ry. Co.* v. *Geary*, 239 U. S. 277, 280, 281. *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission*, 260 U. S. 212. *Western & Atlantic R. R.* v. *Railroad Commission of Georgia*, *ante*, 264. The amendment seems to have been introduced to prevent any question that such

narrowing the meaning and effect of the section, the amendment was plainly intended to enlarge the law, so that where such an administrative order is attacked as unconstitutional the case is within the purview of the section. Section 2284 provides in considerable detail for the convening of the court and its functioning and includes a provision for notice to State officers when "the enforcement, operation or execution of State statutes or *State administrative orders*" is involved. *Oklahoma Natural Gas Co.* v. *Russell* has been cited with approval in numerous cases, among them:

United States v. *New York Central R. Co.*, 279 U. S. 73, 79 (1929).
King Manufacturing Co. v. *Augusta*, 277 U. S. 100 (1928).
Herkness v. *Irion*, 278 U. S. 92 (1928).
Ex Parte Williams, 277 U. S. 267 (1928).

This Court has entertained appeals from three-judge district courts without raising any question that they should have been tried before a single judge, for instance:

Mississippi R. R. Comm. v. *Mobile & Ohio R. Co.*, 244 U. S. 388 (1917).
Prendergast v. *New York Telephone Co.*, 262 U. S. 43 (1923).
Smith v. *Illinois Bell Telephone Co.*, 270 U. S. 587 (1926).[13]
Railroad & Warehouse Commission v. *Duluth Street Ry. Co.*, 273 U. S. 625 (1927).[13]
Public Utilities Commission v. *United Fuel Gas Co.*, 317 U. S. 456 (1943).

In each of the five cases just cited there was a direct attack upon a state commission's order.

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orders were within the section. It was superfluous as the original statute covered them. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 301, 318. *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 555. *Grand Trunk Western Ry. Co.* v. *Railroad Commission of Indiana*, 221 U. S. 400, 403. But it plainly was intended to enlarge not to restrict the law. We mention the matter simply to put doubts to rest."

[13] The record in this Court shows these were appeals from three-judge district Courts.

Three-judge courts have been convened and functioned as special United States district courts in many cases involving orders of state regulatory commissions, and most recently in respect of orders denying applications of railroads to discontinue unprofitable passenger trains. We submit citations thereto as Appendix D, page 41.

The late Chief Justice Hughes, delivering the unanimous decision of the Court in *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10 (1930), considered this very question, from which it appears that appellants' contention here is without merit, for, at page 15, the Court said:

> "* * * If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administrative order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits as he would be to grant either an interlocutory or a permanent injunction."

Appellants' argument points to three requirements which they say must be met before a three-judge court may be invoked under Section 2281: (a) an injunction must be sought; (b) it must be on the ground of the unconstitutionality of a state statute, and citing *Oklahoma Natural Gas Co.* v. *Russell*, interpreting "statute" to include "order"; and (c) the injunction must seek restraint of enforcement, operation, or execution of the statute or order whose constitutionality is attacked. The appellants' brief admits (a) and admits (b) to the extent that an order of the state commission was entered, but then argues that the averment in the bill in respect of the unconstitutionality of the statute was purely colorable, and stressed the fact that Southern's attorneys did not argue the point and the three-judge court did not pass upon it.

To that we recall that appellants filed their motion to stay the action in the district court upon the very ground

that the constitutionality of the state statute had been challenged and that the determination thereof should be by the state courts and not in a federal court (R. 48). But this is really a matter of no moment, for, undoubtedly the bill contained equity and invoked the protection of the Fourteenth Amendment to the Federal Constitution in a United States district court which was exercising jurisdiction through diversity of citizenship. Appellee railway has been asserting its constitutional rights in the premises from the filing of its original petition with the state commission, its supplemental petition, and the bill of complaint, and amendment thereto, in the district court. Examination of those pleadings will show beyond any question that appellee railway made it perfectly clear that it was seeking to preserve its constitutional rights. In the complaint before the district court, after alleging the order of December 5 was in violation of Fourteenth Amendment to the Federal Constitution, the complaint set out specific references to penalty statutes provided in the Alabama Code designed to force railroads to observe state commission orders and thus subjected appellee and its officers, agents, and employees, to the imposition of severe penalties and multiplicity of suits. The prayer was for an interlocutory and permanent injunction enjoining defendants "from proceeding against plaintiff (appellee here) its officers, agents, or employees, to enforce any penalties or other remedies provided under the laws of the State of Alabama on account of plaintiffs or their failure to restore the operation of said two passenger trains, * * *," and for a temporary restraining order in the same language.

Appellee, plaintiff below, amended its complaint by pleading the order of the state commission of January 9, 1950, wherein the original and supplemental petitions to discontinue these trains were denied. Therein appellee invoked the protection of the Fourteenth Amendment and the Commerce Clause of the Federal Consitution, and prayed for injunctive relief against defendants "from pro-

ceeding against the plaintiff, its officers, agents, or employees, to enforce any penalties or other remedies provided by the laws of the State of Alabama by reason of plaintiffs or their failure, or the failure of any of them, to restore the operation of said two passenger trains * * * as required by said order of defendant Alabama Public Service Commission of December 5, 1949, and as is inherent in said order of January 9, 1950."

The railway had filed its original and supplemental applications with the Commission (Docket 12221). Before they were heard the Commission entered a peremptory order on its citation (Docket 12225) commanding restoration of the trains as of the date of such order. It so issued its order despite the request of Southern's attorneys that if the Commission should decide to enter such an order, it be made effective after the date of the hearing on the original and supplemental petitions December 8.

In that situation, the State, on relation of its Public Service Commission, might have instituted mandamus proceedings against the Railway to compel compliance with its order of December 5 to restore the trains;[14] or might have invoked the penalties of the several Alabama statutes. Obviously the railway was confronted with mandamus proceedings or penalties to enforce compliance,—perhaps even with proceedings under Title 48 Alabama Code, § 78, as for contempt. The prayer of the complaint met such practical situation as clearly as it is possible to state it.

When the order of January 9 was issued, negative in form, but very positive and direct in effect, the protection the railway had to have, unless it complied by restoring the trains, was injunctive relief against action by the Commission, or the Attorney General, to enforce compliance by the penalties and sanctions provided in the Alabama statutes. The district court so construed the cause and prayers therein before it and, after denying defendants

[14] Alabama Public Service Com. v. Western Union Tel. Co., 208 Ala. 243, 94 So. 472 (1922); State v. Western Union Tel. Co., 208 Ala. 228, 94 So. 466.

motions, found confiscation in law and in fact, and thereupon granted a permanent injunction against defendants "from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents, or employees, to enforce the provisions of said orders, or either of them, or to enforce any penalties or other remedies against the plaintiff, its officers, agents, or employees, on account of the failure to observe the provisions and requirements of said orders, or either of them, by discontinuing and not restoring the operation of plaintiff's local passenger trains 11 and 16 between Birmingham, Ala., and the Alabama-Mississippi state line."

We submit language could not be drawn any clearer than it was drawn in the complaints, prayers therein, and in the decree of the court, and completely answers appellants' contention that the relief prayed and granted is not within the purview of Title 28 U. S. C. Section 2281.

In support of their contention on this Point II in their argument appellants oddly enough cite *Phillips* v. *United States*, 312 U. S. 246 (1941). There, at page 251, it was said:

> "To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.'"

In that case we find the state and the Federal Governments had joined hands in flood control and hydro-electric development. While the work was nearing completion the Governor of the state unsuccessfully pressed against the "Authority claims for the flooding of roads within the dam area", and, finally, to enforce his own views he declared martial law in the area and ordered the Adjutant General of

the state to occupy it. There was no state statute involved and there was no order of an administrative board or commission.

The court, at page 253, distinguished *Sterling* v. *Constantin*, 287 U. S. 378 (1932) thought to be in point by saying that in the *Sterling case* martial law was employed in support of an order of the Texas Railroad Commission. "The Governor was sought to be restrained as part of the main objective to enjoin 'the execution of an order made by an administrative . . . commission,' and as such was indubitably within § 266." (28 U. S. C. 2281). Thus the *Sterling case* squarely supports the injunctive relief Southern has sought in the case at bar by restraining the Attorney General from proceedings under the penalty statutes or otherwise to enforce the Commission's orders.

Appellants' reliance upon *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386 (1934), is no more support for their position on this phase of their argument than the *Phillips case*, which we have discussed. In the *Oklahoma Gas case* it appears that a three-judge United States district court had been convened to hear a suit brought by Oklahoma Gas Company, and another public service company, against Wilson & Company, Incorporated (later Oklahoma Packing Company), a private business corporation, the State Corporation Commission, and the Attorney General, to enjoin an order of the Commission. The Commission's order had directed the Oklahoma Gas Company to supply Wilson & Company with gas at a prescribed rate assailed as an infringement of the due process and contract clauses of the Federal Constitution. The order was made upon petition of Wilson & Company to the state commission. The suit was against the State Corporation Commission to enjoin enforcement of an order affecting service and rates of the plaintiff Gas Company, and also against a private corporation which was the beneficiary of the state commission's order, and to restrain the latter from prosecuting an action to recover what it paid in excess. Before this Court the

case, we think, may fairly be said to have turned upon this statement at page 389:

> "* * * Upon the trial, the court below made its finding, not assailed here, that no penalties could be imposed for non-compliance with the challenged order, as it had been suspended by supersedeas in the proceedings to review it before the Supreme Court of Oklahoma, and while they were pending it had become inoperative by reason of the order of the Commission establishing the new rate."

Thereupon this Court, being without authority to entertain a direct appeal, vacated the decree below and remanded for further proceedings providing for a fresh order to save appellants their proper remedies as before the normal United States district court.

In the case at bar there has been no vacation of the orders of the Alabama Public Service Commission here complained of. The court below found, and as the record clearly shows, appellee railway was threatened with the sanction of penalties provided by the Alabama statutes. Certainly in the case at bar there is no case of a private litigant being involved in any way in the proceedings. The issue here is squarely between the state authorities, on the one hand, and appellee railway, on the other.

We have devoted more attention to this point appellants have made against the jurisdiction of the three-judge district court than it really needs because some misunderstanding seems to have grown out of the decision in *Ex Parte Bransford*, 310 U. S. 354 (1940). That was a suit by a national bank to enjoin collection of a state tax. The bank made no attack on a state statute but alleged that it had been misconstrued by state officials who, as a result thereof, had made an assessment alleged to have been unconstitutional. The defendants petitioned for a writ of mandamus to require the federal judge to convene a three-judge court. It was held in this Court that the hearing before a single

judge was proper. At page 361 of the decision, the following appears:

> "* * * It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court."

The cases cited, we submit, clarify the meaning of the decision in the *Bransford case* and show the error of appellants in the reliance they have placed upon it. Hence we now review the authorities cited in the *Bransford case*.

Stratton v. *St. Louis Southwestern Ry.*, 282 U. S. 10 (1930), in which the Court held it was necessary to convene a three-judge federal court to have a suit brought by the railway to restrain the enforcement of an Illinois tax statute upon the ground that the statute, *as applied to the complainant*, violated the commerce clause and the due process and equal protection clauses of the Federal Constitution. The Court clearly states in this case that where it is sought to enjoin the enforcement of a state statute or an administrative order made pursuant to a state statute upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction.

Another case cited in *Ex Parte Bransford* is *Ex Parte Hobbs*, 280 U. S. 168 (1929), wherein a writ of mandamus was sought to require a district judge to call a three-judge court. The original plaintiff had sued to enjoin state officers from enforcing an order fixing its rates, and from revoking its license for failure to obey the same, alleging diversity of citizenship and that the order, and certain state statutes, if construed to sanction it, were violative of the due process clause of the Fourteenth Amendment. However, the plaintiff prosecuted his case only as a suit to enjoin the revocation of his license on the ground that such revoca-

tion would not be authorized by the state statutes, considering them as valid. The injunction was granted on the latter basis so there was held to be no reason to convene a three-judge court.

Ex Parte Williams, 277 U. S. 267 (1928) also cited in the *Bransford case*, involved a suit by a railroad to enjoin county treasurers from collecting taxes from the railroad based on assessments which the railroad contended were in violation of the equality clause of the Fourteenth Amendment. When the cause was ready for final hearing the defendants moved for a three-judge federal court and, upon the single judge's refusal to convene it, they petitioned for mandamus. This Court held that "a case does not fall within § 266 unless a statute or an order of an administrative board or commission is challenged as contrary to the Federal Constitution" citing *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290, and *Ex Parte Buder*, 271 U. S. 461, 465 (1926). The Court then pointed out that there was no question as to the validity of the taxing statute and "an assessment is not an order made by an administrative board or commission within the meaning of that section." The difference lies in the fact that the function of an assessing board is merely to assess, not to levy. Its function is informational. The distinction between that function and the function of regulating expressed in orders of a railroad or like commission was noted.

Ex Parte Collins, 277 U. S. 565 (1928), was cited in the *Bransford case* for the proposition that "even where the statute is attacked as unconstitutional," § 266 is inapplicable unless the action "complained of is directly attributable to the statute." Petitioner there had applied for a three-judge federal court in a case wherein he was seeking to enjoin municipal authorities and a contractor employed by the city from proceeding under a resolution of the city directing the paving of a street. The improvement was to be made pursuant to a state statute providing for assessment of the cost of improvements against abutting prop-

erty which petitioner claimed was unconstitutional in that it made no provision for giving the property owners a hearing. The Court held this suit did not fall within the purview of § 266 despite the attack on the constitutionality of a state statute since the petitioner sought to enjoin a municipality rather than the state. Section 266 was said to apply only where the object of the suit "is to restrain the enforcement of a statute of general application or the order of a state board or commission."

In view of the cases above which are the authorities cited in the *Bransford case* in support of the holding we have quoted, it appears that, despite the apparent misunderstanding of the wording of the *Bransford* opinion, that opinion does not go beyond holding that an assessment is not an administrative order and finding that an attack on an assessment is not an attack on the statute. Nothing in subsequent opinions which cite the *Bransford case* purports to extend its meaning beyond those limits.

Supreme Court cases since the *Bransford case* are the following.

Phillips v. *United States*, 312 U. S. 246 (1941), which we have already discussed.

Query v. *United States*, 316 U. S. 486 (1942), involved a suit to restrain the enforcement of a state sales tax on the purchase and sale of goods at Army Post Exchanges. It was contended that application of the state tax to Post Exchanges was an unconstitutional interference with an instrumentality of the federal government. Respondents denied that Post Exchanges were such instrumentalities and stated that no act of Congress giving consent to certain state taxation within federal areas was necessary since territorial immunity was removed by Public Act No. 819, 76th Congress.

Although the district court was in doubt, this Court held that this was a case for a three judge federal court, finding that this case involved more than the construction of a federal statute as in *Ex Parte Buder*, 271

U. S. 461, 466-467. This case was found to involve an effort to restrain the application of a state statute upon the ground "of the unconstitutionality of the threatened application." Not only was that the ground asserted by the complaints for the relief sought, but the relief awarded was based on that ground. This Court's opinion so found despite the district court's statement that only the meaning of the federal statute was involved.

Ex Parte Bransford was cited in this opinion for the proposition that where a substantial charge has been made that a state statute violates the Constitution, relief in the form of an injunction can be afforded only by a three-judge court pursuant to § 266.

The *Phillips case* was distinguished as a case in which the state officials threatened to engage in conduct which state law could not reasonably be construed to authorize.

This case clearly shows that a three-judge court is the proper forum for testing "the enforcement, operation, or execution" of a state administrative order upon the ground of the unconstitutionality of such order even though the statute otherwise is not unconstitutional. The analogy to the case at bar is very close in this respect.

Case v. *Bowles*, 327 U. S. 92 (1946) involved the application of the Emergency Price Control Act to a sale of state lands for the support of schools under provisions of a state law. It was held that since the preeminence of the federal law over the state was at issue, this was not a § 266 case. The complaint did not challenge the constitutionality of the state law; it merely alleged that its enforcement would violate the Emergency Price Control Act.

We submit in the case at bar that the three-judge district court undoubtedly had jurisdiction.

III.

Appellants' Contention That Federal Courts Should Abstain From Exercising Jurisdiction of Matters Properly Decided by State Courts Is Unsound and Without Merit.

The contention is made broadly and irrespective of whether the district court is a three-judge or a single-judge court. In our reply we take issue with the correctness of appellants' contention as applied to the case at bar.

We submit appellee railway has followed state procedure exactly, as far as it could safely follow state procedure. Having elected to file its complaint in the federal court, it did so in full compliance and in keeping with the statutes and decisions.

To begin with, appellee filed its petition with the state commission for authority to discontinue the trains and while their operation was suspended, under order of the Interstate Commerce Commission, filed a supplemental petition with the Alabama Commission for authority not to restore operation. Appellee does not here challenge the constitutionality of the requirement contained in Section 106, Title 48 Alabama Code of 1940, that such application must be made.

There is no provision in the Alabama law making a petition for reconsideration or rehearing before the state commission mandatory before a party at interest resorts to the courts. Hence no such petition was filed by appellee. *Prendergast* v. *New York Telephone Company*, 262 U. S. 43, 48 (1923).

The state's statutory review of its commission's orders in the state courts contemplates judicial as distinguished from administrative action. *Avery Freight Lines* v. *Persons*, 250 Ala. 40, 32 So. (2d) 886, 889 (1947).

Therefore our case had definitely passed from the administrative to the judicial stage in which appellee had the right of election whether to sue in federal or state courts. *Bacon* v. *Rutland Railroad Co.*, 232 U. S. 134 (1914).

In *Prentiss* v. *Atlantic Coast Line*, 211 U. S. 210 (1908) it was said at page 228:

> "* * * If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals (of Virginia) after a final judgment, they would come here with the facts already found against them. . . . All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent. 'A State cannot tie up a citizen of another State, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.' "[15]

R. R. Commission v. *Duluth St. Ry.*, 273 U. S 625 (1927), at page 628, it was said:

> "* * * Where as here a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the State Court when at least it is possible that as we have said it would find itself too late if it afterwards went to the District Court of the United States.[16]

The charge of unconstitutionality, paragraph 4 of the bill, that no standards for the guidance of the Commission are prescribed for exercising its power under Section 106, is termed colorable by appellants pointing out that appellee did not argue the point in the court below. Nor did the Court rest its decision upon it. If, therefore, under appellants' view this constitutional issue was more apparent than real it may, we submit, be laid aside as mere surplusage. But that is not necessary because the Alabama Su-

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[15] Omitted authorities: *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 391; *Smyth* v. *Ames*, 169 U.S. 466, 517; *McNeill* v. *Southern Railway Co.*, 202 U.S. 543; *Ex parte Young*, 209 U.S. 123, 165; *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. Rep. 866; *Northern Pacific Ry. Co.* v. *Keyes*, 91 Fed. Rep. 47; *Western Union Telegraph Co.* v. *Myatt*, 98 Fed. Rep. 335.

[16] Omitted authorities: *Pacific Telephone & Telegraph Co.* v. *Kuykendall*, 265 U.S. 196; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290.

preme Court has construed the statute and stated the guides to be observed in enforcing the statute. *Alabama Public Service Commission* v. *Atlantic Coast Line R. Co.*, 253 Ala. 559, 45 So. (2d) 449, 451 (1950).

From the foregoing it appears there is no constitutional question which appellants may properly say should be first decided by the state courts. There is nothing left, therefore, but the Alabama Commission's *application* of the state statute whereunder it exercised its power to deny appellee's petition. Thus we have a clear case of a *state statute applied* against which appellee claims the protection of due process under the Fourteenth Amendment to avoid confiscation of its property. It clearly follows that such application of the state statute in violation of the constitutional guarantees brings the case at bar squarely within the purview of Sections 2281 and 2284, Title 28 U. S. C., in keeping with the decision of this court in *Ex Parte Bransford*, 310 U. S. 354.

We have heretofore shown how utterly reckless it would have been for appellee to have waited indefinitely for suit against it to enforce penalties for noncompliance with the Commission's order. *Wadley Southern* v. *Georgia*, 235 U. S. 651. So that course was not open to us.

The statutory method of review provided in the Alabama law is the only method provided, Sections 17, 79, 81, 82, 84-89, Title 48 Alabama Code 1940. Appendix B. The hearing in the Circuit Court of Montgomery County is not de novo but must be confined to the record made before the Alabama Commission. There must necessarily be an interval of time between the issuance of the state commission's order and action by circuit court during which the record before the state commission is gathered together and filed with the court. Should appellee here have sought review in the circuit court it would have had no protection against the order of the Commission of December 5, 1949. It commanded appellee to restore the operation of the trains as of that date. Even if it had been possible to have filed the record

with the circuit court in a short time, that court could not have granted appellee any protection against action by state authorities to compel compliance or enforce penalties in the interim. We say that advisedly, despite the argument of appellants that there is provision in state law for the circuit judge to grant a supersedeas. The provision for bond and supersedeas is not applicable to the case at bar. We submit that is clearly apparent from reading the several sections of the law which we have printed in the appendix hereto. The provision for supersedeas contained in the law in respect of rate cases is not applicable here. By no stretch of the imagination can that provision for supersedeas specifically provided for rate cases be taken to afford protection to appellee here against the accrual of the penalties or enforcement of other remedies which the state might invoke against it to compel compliance with the commission's orders of December 5, 1949, or January 9, 1950.

We stress the fact that appellee was here confronted with imminent danger of irreparable injury and multiplicity of suits and properly invoked the jurisdiction of the federal court in a case wherein diversity of citizenship existed and the jurisdictional amount was met. Here was undoubtedly a special case and one in which the federal court wisely exercised its discretion in assuming jurisdiction and granting the relief prayed.

The Congress has prescribed the jurisdiction of United States district courts and from time to time has changed it and limited it, notably in respect of state tax matters and state commission rate orders. 28 U. S. C. Sections 1341, 1342. While not limiting jurisdiction, the Congress provided for those instances in which a federal court should stay its hand by the amendment of March 4, 1913, now the last paragraph of Section 2284. The amendment provided for a stay by "any court of the United States." As amended by the Act of June 25, 1948, the requirement is that "a District court of three judges" shall, before final hearing, stay action, etc., in order to permit of deter-

mination in the state courts. But such a stay is only to be granted when it appears that there is a pending proceeding in the state court and in which the state court has stayed proceedings under the statute or order pending its determination. In the case at bar it does not appear that any such state court action was pending.

The order of the Interstate Commerce Commission, under which the trains were suspended, was lifted, effective November 21, 1949. The complaint was filed December 6, 1949. The hearing before the three-judge district court was on January 12, 1950. The final decree was issued February 13, 1950. The state authorities took no action in the state courts for enforcement of the Commission's order. It must follow that having failed to avail of the opportunity given under the federal statute to litigate the issues in the state courts and to avoid any possible conflict between federal and state procedures, the appellants should not now be heard to challenge the wise discretion of the district court in going forward with the case and rendering its final decree therein on February 13, 1950.

We now examine the authorities appellants cite in support of Point III.

Stainback v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949). The complaint called for broad consideration of the application of an act of the Territory of Hawaii to foreign language schools, which act had not been construed by the Hawaiian courts. This was not a statute of a state.

Railroad Com. of Texas v. *Pullman Co.*, 312 U. S. 496 (1941). State Railroad Commission required a Pullman conductor though only one Pullman car attached to a train; the colored porter not enough. The question was whether the state statute gave the Commission appropriate power. No multiplicity of suits or imminent danger of irreparable damage existed, such as confronted appellee in the case at bar.

Meredith v. *Winter Haven*, 320 U. S. 228 (1943). Invoking jurisdiction solely on diversity of citizenship, Meredith and others, as owners of city's bonds, sued in the

federal district court to enjoin the city from calling the bonds without providing for payment of deferred interest coupons. The question presented to this Court was whether the circuit court of appeals, on appeal from the judgment of the district court, rightly declined to exercise its jurisdiction on the ground that decision of the case turned on questions of Florida constitutional and statutory law which the decisions of the Florida courts had left in a state of uncertainty. Reversing the court of appeals this Court said at page 234:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.[17] When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act."

Phillips v. *United States*, 312 U. S. 246 (1941). We have discussed under appellants' Point II. It no more supports appellants Point III than *Meredith* v. *City of Winter Haven*, just referred to.

Burford v. *Sun Oil Co.*, 319 U. S. 315 (1943). The injunctive relief sought in the federal district court involved the comprehensive general regulatory system de-

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[17] Omitted authorities: *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 618; *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 387; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234-235; *McClellan* v. *Carland*, 217 U. S. 268, 281-282.

signed by Texas for conservation of oil and gas in one of the largest fields and as the Court said: "* * * as thorny a problem as has challenged the ingenuity and wisdom of legislatures" (p. 318). We pause to say there is nothing like that in the case at bar. And there is this further and all-important difference, for this Court pointed out at page 326:

> "* * * the orders of the Commission are tested for 'reasonableness' by trial de novo before the court, *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 76-80, 161 S. W. 2d 1022, and the court may on occasion make a careful analysis of all the facts of the case in reversing a Commission order. *Railroad Commission* v. *Gulf Production Co.*, 134 Tex. 122, 132 S. W. 2d 254. The court has fully as much power as the Commission to determine particular cases, since after trial de novo it can either restrain the leaseholder from proceeding to drill, or, if the case is appropriate, can restrain the Commission from interfering with the leaseholder. The court may even formulate new standards for the Commission's administrative practice and suggest that the Commission adopt them."

We stress the fact that the state courts' review of the Texas Commission's order under the Texas statutes is broader than in Alabama. Besides, appellants are not on sound ground in trying to set up a similarity of state wide policy as between the complexities of the Texas oil and gas conservation program and the Alabama statute requiring railroads (§ 106) and utilities generally (§ 35) to secure authority from its Public Service Commission before discontinuing operations. There is nothing novel about such a statutory requirement. Practically every state in this country has them and they are about as old as the state regulatory commissions themselves. Appellants' reference to other similar cases in the same district court following the case at bar, adds nothing to support appellants' argument—just the contrary. For the fact that this appellee, the Atlantic Coast Line R. R., and Louisville & Nashville

R. R. have all had to seek relief from the Alabama Commission's orders goes to show that the only policy the State has, based on these orders of the Commission, is to flatly deny all efforts of rail lines operating in Alabama to discontinue unprofitable passenger trains for which there is no public need and thus conserve their operations in the public interest—a duty they owe to themselves and to the public.

The judges who comprised the three-judge district courts in No. 146 and No. 395 are outstanding Alabama lawyers. They must know the Alabama statutes for review of State Commission's orders. Indeed, Honorable Leon McCord, Judge of the Court of Appeals of the Fifth Circuit, who sat in both cases, was formerly the judge of the Circuit Court of Montgomery County, Alabama.[18] That court has exclusive jurisdiction to review orders of the Alabama Public Service Commission. Section 79, Title 48, Alabama Code.

CONCLUSION.

We submit that the three points appellants have made in presenting their appeal to this Court are without merit and the arguments undertaken to be made in their support are unsound. In addition, we submit there is one very important point that we stress in concluding our argument: The points appellants have made present procedural questions; not one of them goes to the merits. We say this is all important because the appeal on the three procedural grounds argued in effect necessarily admits the fundamental error of defendant Commission in denying appellee's application to discontinue operation of the trains in question. To prevail on the procedural points made on this appeal would in no sense be a justification of defendant Commission's denial of appellee's application. The appeal, as here taken, is a confession of error on the part of the Alabama Public Service Commission. The three-judge district court prop-

[18] *Alabama Public Service Commission v. West Union Telegraph Co.*, 208 Ala. 522, 94 So. 472 (1922).

erly exercised a sound discretion in assuming jurisdiction, hearing the cause and entering its final decree therein. We submit the decree should be affirmed by this court.

Respectfully submitted,

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APPENDIX A.

Title 28 United States Code.

§ 1253. *Direct appeals from decisions of three-judge courts.*—Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§ 1331. *Federal question; amount in controversy.*—The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

§ 1332. *Diversity of citizenship; amount in controversy.*—(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States; . . .

§ 2281. *Injunction against enforcement of State statute; three-judge court required.*—An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§ 2283. *Stay of State court proceedings.*—A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

§ 2284. *Three-judge district court; composition; procedure.*—(5) * * * A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

APPENDIX B.

Code of Alabama 1940—Title 48.

§ 17. (9813) *Exclusive powers and jurisdiction of commission.*—The rights, powers, authority, jurisdiction and duties by this title, conferred upon the commission shall be exclusive and in respect of rates and service regulations and equipment, shall be exercised notwithstanding any rights heretofore acquired by the public under any franchise, contract or agreement between any utility and municipality, county or municipal subdivision of the state, and shall be exercised, so far as they may be exercised consistently with the constitution of the state and of the United States, notwithstanding any right heretofore so acquired by any such utility.

§ 79. (9831) (9832) *Appeals from orders of commission.*—From any final action or order of the commission in the exercise of the jurisdiction, power, and authority conferred upon it by this title, an appeal therefrom shall lie to the circuit court of Montgomery County, sitting in equity, except appeals under chapter three of this title, and thence to the supreme court of Alabama. All appeals shall be taken within thirty days from the date of such action or order and shall be granted as a matter of right and be deemed perfected by filing with public service commission a bond for security of cost of said appeal when the appellant is a utility or person, and by filing notice of an appeal when the appellant is the State of Alabama.

§ 81. *Right to supersede order.*—On any such appeal any utility, interested party, or intervenor may supersede any decree rendered by giving such supersedeas bond or bonds as may be appropriate to the proceedings as provided for herein for superseding an order or orders of the commission.

§ 82. *Proceedings on appeal.*—The commission's order shall be taken as prima facie just and reasonable. No new or additional evidence may be introduced in the circuit court except as to fraud or misconduct of some person engaged in the administration of this title and affecting the order, ruling or award appealed from, but the court shall otherwise hear the case upon the certified record and shall set aside the order if the court finds that: the commission erred to the prejudice of appellant's substantial rights in its application of the law; or, the order, decision or award was procured by fraud or was based upon a finding of facts contrary to the substantial weight of the evidence. Provided, however, the court may, instead of setting aside the order, remand the case to the commission for further proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing, remand the cause to the commission for the purpose of taking additional testimony or other proceedings.

§ 84. (9838) *Appeal does not supersede order; supersedeas bond.*—No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof, upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the appeal be from an order of the commission reducing or refusing to increase such rates, fares or charges, or any of them, or any schedule, or part or parts of any schedule of such rates, fares or charges, the appellate court, or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as a condition precedent to the granting of said supersedeas that the utility applying for the same shall execute and file with the clerk of said court a bond, which bond shall be as hereinafter provided:

§ 85. (9839) *Oath of utility as to approximate amount of revenue.*—In the application for said supersedeas the utility shall, under oath, state the estimated approximate amount by which its revenues will be increased or reduced as the case may be, in six months, by reason of the increased rate sought by it or the reduced rate complained of.

§ 86. (9840) *Penalty and condition of bond.*—The bond required by the two preceding sections shall be double the sum so estimated with two or more sureties, one of which may be a surety company, to be approved by the judge, payable to the State of Alabama and conditioned to pay all such loss or damage as any person, firm or corporation may sustain, including all such excess rates, fares or charges, as such person, firm or corporation may have paid pending said appeal or any subsequent appeal to the supreme court in the event the order or action of the public service commission shall be sustained.

§ 87. (9841) *Additional bond.*—An additional bond of like amount and with the same conditions shall be given at the end of each six months, pending the appeal and pending any subsequent appeal by either party to the supreme court.

§ 88. (9842) *Effect of supersedeas bond.*—From the time said bond shall have been given the order appealed from shall be stayed and superseded and it shall be lawful for the utility to charge the rates, fares, or charges which had been reduced by said order, or the rates, fares or charges sought to be established by its petition, until the final disposition of said cause. If said utility shall fail after thirty days' written notice to give such additional bond at the end of each six months, pending said appeal, and pending any subsequent appeal to the supreme court, the stay or supersedeas shall terminate, and the rates, fares, or charges established by statute or by the public service commission or by the order or action appealed from, shall be revived and shall be the lawful rates pending all further proceedings in the cause.

§ 89. (9690) (5698). *Suspension of rates shall only affect companies giving required bonds.*—If any rate or rates or order or orders shall under the provisions of this chapter be suspended by the giving of any of the bonds provided for herein, the suspension shall be operative as to and shall affect only the utilities complaining and giving such bond.

§ 106. (9713) *Permit to abandon service.*—No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment.

APPENDIX C.

Chronological History of the Case.

September 13, 1948: Southern Railway filed its petition with the Alabama Public Service Commission for authority to discontinue passenger trains Nos. 11 and 16—Docket No. 12221 (Exhibit 1 to the complaint, R. 19-20).

October 26, 1949: Southern Railway discontinued trains Nos. 11 and 16 in compliance with Interstate Commerce Commission Service Order No. 843, dated October 21, 1949 (Exhibit 2 to complaint, R. 19-20).

October 26, 1949: Alabama Public Service Commission notified Southern Railway that it is expecting that each and every train which might have been removed in compliance with the I. C. C. order will be restored to service within twenty-four hours after the I. C. C. order might be rescinded (Exhibit 4 to complaint, R. 4, 26).

November 10, 1949: Southern Railway filed supplemental petition with Alabama Public Service Commission for authority not to restore operation of trains Nos. 11 and 16 (Exhibit 3 to complaint, R. 21-23).

November 18, 1949: Southern Railway advised Alabama Public Service Commission that trains 1 and 2, 7 and 8, and 15 and 16, which had been discontinued under I. C. C. Service Order No. 843, would be restored November 21, 1949.

Southern Railway attorneys so advised Alabama Public Service Commission by telephone and telegraph, and asked for a hearing on Southern's supplemental petition.

The President of the Alabama Public Service Commission advised Southern Railway's attorneys that a hearing had been set for Fayette, Ala., on December 8, 1949, but would not be held unless trains 11 and 16 were restored (Paragraph 9 of complaint admitted by paragraph 9 Commission's answer).

November 21, 1949: Interstate Commerce Commission Service Order No. 843 vacated by Service Order No. 843-A dated November 14, 1949 (Exhibit 5 to complaint, R. 26-27).

November 22, 1949: By exchange of telegrams Alabama Commission asked whether trains 11 and 16 would be restored. Southern replied "no" insisting on hearing on its supplemental petition. (Exhibit 6, R. 28-29.)

November 22, 1949: Alabama Commission issued its citation, Docket 12225, for Southern Railway to show cause before it why the Commission should not enter an order specifying the Railway's refusal to restore operation in violation of the Alabama Code, Title 48, and requiring that such violation be discontinued (Exhibit 7 to complaint, R. 31-32).

November 25, 1949: Southern Railway appeared before the Commission in response to citation, Docket 12225 (Exhibit 7 to complaint). The Commission refused to receive evidence offered by Southern, to which Southern excepted, and asked if order to restore trains should be entered that it be made effective after the hearing set for December 8 at Fayette, Ala. (Paragraph 12 of complaint, R. 6, R. 7).

December 5, 1949: Alabama Commission entered its order in Docket 12225 commanding Southern to restore operation, referring to penalties for failure to comply, and further providing that unless Southern purged itself of the alleged contempt it would be optional whether the Commission would hear its original and supplemental petitions, then set for Fayette, December 8 (Exhibit 8 to complaint, R. 33-37).

December 6, 1949: Southern Railway filed its bill in United States District Court at Montgomery (R. 1-13).

December 6, 1949: District Court entered its order temporarily restraining the Commission and state authorities from compelling the Railway to restore the operation of the trains (R. 40-42).

December 8, 1949: Original and supplemental petitions, Docket 12221, heard before Alabama Public Service Commission at Fayette, Ala. (R. 55).

December 14, 1949: Alabama Commission, et al., defendants, filed their motion to dismiss (R. 43-45).

January 4, 1950: Interstate Commerce Commission entered its Service Order No. 845, effective January 5, 1950, again directing the railroads to curtail their coal-burning passenger locomotive miles by 33-1/3 per cent, to expire March 8, 1950 (recited in Commission's order, R. 57).

January 9, 1950: The Alabama Commission entered its report and order in Docket 12221 Railway's original and supplemental petitions, heard Fayette, December 8, 1949, wherein the Commission denied authority requested to discontinue trains 11 and 16 (Exhibit A to defendants' answer, R. 55-63).

January 12, 1950: Southern Railway amended its complaint (R. 46-47).

January 12, 1950: Commission, et al., defendants, amended their motion to dismiss (R. 47-48).

January 12, 1950: Commission, et al., defendants, filed their motion to stay action (R. 48-49).

January 12, 1950: Defendant Commission, et al., filed their answer (R. 49-54).

January 12, 1950: Cause heard before three-judge District Court as Montgomery.

February 8, 1950: Statutory District Court filed its opinion (R. 63-69).

February 13, 1950: Statutory District Court entered its final decree vacating defendant Commission's orders of December 5, 1949, and January 9, 1950, and enjoining defendants from taking steps to enforce said orders by penalties or otherwise (R. 69-70).

April 12, 1950: District Court entered order allowing appeal (R. 70-71).

October 9, 1950: This Court noted probable jurisdiction (R. 73).

APPENDIX D.

List of Authorities Referred to on Pages 9 and 15.

Northern Pacific R. Co. v. *Board of R. R. Commissioners,* D. Mont., 28 F. Supp. 810 (1939).

Northern Pacific R. Co. v. *Board of R. R. Commissioners,* D. Mont., 46 F. Supp. 340 (1942).

New York Central R. Co. v. *Illinois Commerce Commission,* N.D. Ill., 77 F. Supp. 520 (1948).

Chicago, B. & Q. R. Co. v. *Board of R. R. Commissioners,* D. Mont., 78 F. Supp. 1010 (1947).

Southern Railway Co. v. *South Carolina Public Service Commission,* E.D. S.C., 31 F. Supp. 707 (1940).

Atlantic Coast Line R. Co. v. *Public Service Commission,* E.D. S.C., 77 F. Supp. 675 (1948).

Chicago, B. & Q. R. Co. v. *Illinois Commerce Commission,* N.D. Ill., 82 F. Supp. 368 (1949).

Southern Railway Co. v. *Alabama Public Service Commission,* M.D. Ala., 88 F. Supp. 441 (1950).

Southern Railway Co. v. *Alabama Public Service Commission,* M.D. Ala., 91 F. Supp. 980 (1950).

Atlantic Coast Line R. Co. v. *Alabama Public Service Commission,* M.D. Ala., 92 F. Supp. 579 (1950).

The Ann Arbor Railroad Co. v. *Michigan Public Service Commission,* E.D. Mich., 91 F. Supp. 668 (1950).

Louisville & Nashville R. Co. v. *Alabama Public Service Commission,* M.D. Ala., 93 F. Supp. 544 (1950).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 146

ALABAMA PUBLIC SERVICE COMMISSION, ET AL., *Appellants*,

v.

SOUTHERN RAILWAY COMPANY, *Appellee*.

REPLY OF SOUTHERN RAILWAY COMPANY TO REPLY AND SUPPLEMENTAL BRIEF FOR APPELLANTS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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TABLE OF CASES.

CONSTITUTION AND STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 146

ALABAMA PUBLIC SERVICE COMMISSION, ET AL., *Appellants*,

v.

SOUTHERN RAILWAY COMPANY, *Appellee*.

REPLY OF SOUTHERN RAILWAY COMPANY TO REPLY AND SUPPLEMENTAL BRIEF FOR APPELLANTS.

Appellee railway in reply to the reply and supplemental brief filed on behalf of appellants submits that:

I. Appellants err in arguing that this suit is barred by the Eleventh Amendment to the Constitution of the United States.

II. Appellants err in arguing that the decree of the district court unduly circumscribes the state commission's actions.

III. Appellants err in arguing that the Supreme Court of Alabama has not defined the guides to be observed by the state commission.

I.

APPELLANTS ERR IN ARGUING THAT THIS SUIT IS BARRED BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Appellants come now and for the first time aver and argue that the instant suits are in substance actions against the State of Alabama and as such are barred by the Eleventh Amendment to the Constitution of the United States. For that reason they claim the three-judge district court below erred in failing to dismiss the suit. In support of their argument appellants advance the proposition that where a state has not consented to be sued, and if it is the real party in interest a suit against state officers who are merely nominal parties will not avoid the limitations of the Eleventh Amendment. They cite *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459 (1945), *Kennecott Copper Corp.* v. *State Tax Commission*, 327 U. S. 573 (1946), and *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47 (1944). In all these cases although the suits were brought against state officers the result of a judgment against the state officers would involve payment from the state treasury and were thus in fact suits against the state.

It is the position of the railway in the instant case that the Alabama Public Service Commission has issued an unconstitutional order under color of state law and the railway's action is against the members of the Commission for so doing and against the Attorney General to prevent his enforcement of their unconstitutional order. The railway submits that the line of cases landmarked by *Ex Parte Young*, 209 U. S. 123 (1908), which established the theory that a state officer seeking to enforce a state act which violates the Federal Constitution is stripped of his official or representative character and subjected in his person to the consequences of his individual conduct, supports our action in the instant cases. We submit that there is no practical difference between a state officer's or agency's

trying to enforce a state statute which violates the Federal Constitution and its issuing an order which is unconstitutional. Both are parts of the legislative process, both injure the victim in the same way. In fact where an officer applies a valid statute in an unconstitutional way he would seem to be even further removed from the protection of the state's immunity than in the former case.

By acting unconstitutionally an officer exceeds his authority, especially where the statute is constitutional. The state which could not by legislation enact an unconstitutional statute, certainly could not cast its cloak of immunity over an officer who applied a constitutional statute in an unconstitutional way. Acting unconstitutionally is more than an error in judgment. It is a violation of a fundamental right protected by the United States. The appellants' argument that the railway does not come within the exception of *Ex Parte Young, supra*, if sustained, would nullify the provision in the judicial code Title 28 U.S.C. Section 2281 which provides for injunctions restraining the action of any officer of a state in the enforcement or execution of an order made by an administrative board or commission acting under a state statute. Too many cases have been decided in the last forty years under this section and its predecessor, section 266, to permit serious consideration at this time of such an argument as that now made by appellants.

The recent case, *Larson* v. *Domestic and Foreign Corp.*, 337 U. S. 682 (1949), cited by appellants, held that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign whether or not they are tortious under general law. This Court distinguished that case, however, from those cases in which the issue of unconstitutional action on the part of a governmental officer or agency is raised (pages 691, 696, 697, 698-699, 703).

The Court in the *Larson case* acknowledged that where constitutional rights are infringed by the actions of officers of the government, it is proper that the Court have power

to grant relief against those actions. The Court has granted such relief in the following cases in which the issue was the unconstitutionality of the action of an officer of the Government. *United States* v. *Lee*, 106 U. S. 196 (1882); *Noble* v. *Union River R. Co.*, 147 U. S. 165 (1893); *South Carolina* v. *Wesley*, 155 U. S. 542 (1895); *Mississippi R. R. Comm.* v. *Illinois Cent. R. R.*, 203 U. S. 335 (1906); and *Tindal* v. *Wesley*, 167 U. S. 204 (1897).

In *Mississippi R. R. Comm.* v. *Illinois Cent. R. R.*, *supra*, the issue was the constitutionality of an order of a railroad commission. No question was raised concerning the validity of the statute under which the commission functioned. The point was made, and rejected by this Court, that it was a suit in substance against the state. This Court found that a commission created by a state under the authority of its constitution and laws for the purpose of supervising and to some extent controlling the acts of railroads operating within the state is subject to suit by a citizen.

The holding in the *Larson case* is no support for appellants' argument. The distinctions made in the opinion clearly show the validity of the railway's position based on principles laid down in *Ex Parte Young*, *supra*; *Mississippi R. R. Comm.* v. *Illinois Cent. R. R.*, *supra*; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165 (1910); *Herndon* v. *Chicago, R. I. & Pac. Ry. Co.*, 218 U. S. 135 (1910); *Harrison* v. *St. Louis & S. F. R. Co.*, 232 U. S. 318 (1914); *Looney* v. *Crane Co.*, 245 U. S. 178 (1917); and *Public Service Company* v. *Corboy*, 250 U. S. 153 (1919).

II.

APPELLANTS ERR IN ARGUING THAT THE DECREE UNDULY CIRCUMSCRIBES THE STATE COMMISSION'S ACTIONS.

If one can visualize the state commission's hands being tied down by the permanent injunction issued in this case as complainants argue, three very practical aspects of such picture immediately present themselves—First, how does

it happen that this discovery has now been made after, say, forty years' actual experience with the granting of just such injunctions? And, second, how does it happen that such dire result was not argued in the district court and in appellants' initial brief in this Court? And, third, how does it happen that appellants see this result, whatever it may be, from the injunction granted in the district court and failed to see exactly the same result should the state court (into whose hands appellants vainly strive to throw this case) enjoin or supersede the Commission's order? But if the state statutes do not contemplate an injunction and the supersedeas provided merely suspends but does not restrain, then it undoubtedly follows appellee railway was and is without any prompt and adequate remedy in the state courts.

That appellants have erred in ascribing to the decree in question the all encompassing scope whereby the federal court would be interfering with the proper functions of the Alabama Public Service Commission is clearly shown in the second sentence of the decree (R. 69) where it is stated that the decree is based upon the evidence offered in this case. The federal court has not interfered or attempted to interefere with the Commission's proper exercise of its functions, nor restrained it in any way beyond the factual situation involved in this cause.

III.

APPELLANTS ERR IN ARGUING THAT THE SUPREME COURT OF ALABAMA HAS NOT DEFINED THE GUIDES TO BE OBSERVED BY THE STATE COMMISSION.

We refer to *Alabama Public Service Commission* v. *Western Union Telegraph Co.*, 203 Ala. 243, 94 So. 472 (1922), which held as follows:

> "The valid orders of a public service commission will will be enforced in the courts, and orders not author-

ized by law are unenforceable.[1] The final test of validity or invalidity of the order is whether, when all the circumstances that are relevant and material to same as duly presented are considered, the order is reasonable or unreasonable.[2]

"In the finding of the state court, when the conclusion of law and finding of facts are intermingled so as to make it necessary in order to pass upon the question, the Supreme Court of the United States will analyze the facts."[3]

We also refer to *Alabama Public Serv. Com'n.* v. *Atlantic Coast Line R. Co.*, 253 Ala. 559, 45 So. 2d 449 (1950) wherein Mr. Justice Foster delivered the unanimous opinion of the Supreme Court of Alabama. At pages 450-451, he said:

"When that duty is not *imperative*, but what is called *relative*, as in Alabama, in order to justify a reduction of the service, the carrier is not required to show that the rate of return on the system requires the reduction, or that it would impede interstate commerce, but it is sufficient if the reduced plan would supply such train service as the public necessities demand and require. Delaware L. & W. R. Co. v. Van Santvoord, D. C., 232 F. 978, and cases last above cited, including Atlantic Coast Line R. R. v. Public Service Comm., D. C., 77 F. Supp. 675, 685. In the language of our statute, is 'reasonable and just.' Title 48, section 104, Code.[4] 'It is evident that the public service agency is

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Footnotes 1, 2, and 3—omitted authorities.

[1] Miss. R. Com. v. M. & O., 244 U. S. 388, 37 Sup. Ct. 602, 61 L. Ed. 1216; Interstate Comm. Com. v. L. & N., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431, 433; Interstate Comm. Com. v. Nor. Pac., 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308; Miss. R. Com. v. I. C., 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209.

[2] R. R. Com. v. Ala. North., 182 Ala. 357, 364, 62 South. 749; R. R. Com. of Ala. v. A. G. S., 185 Ala. 354, 64 South. 13, L. R. A. 1915D, 98; Miss. R. Com. v. M. & O., 244 U. S. 388, 37 Sup. Ct. 602, 61 L. Ed. 1216.

[3] Jones Nat. Bank v. Yates, 240 U. S. 541, 552, 553, 36 Sup. Ct. 429, 60 L. Ed. 788; Nor. Pac. v. North Dakota, 236 U. S. 585, 593, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; Traux v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254.

[4] Printed in Appendix, with penalty section 399, 400, 405, and 406.

under no obligation to continue to offer a service which the public will not use, where the offer is a financial burden, and where it is unreasonable to demand its continuance.' Thompson v. Boston & Maine R. R., 86 N. H. 204, 166 A. 249; Atlantic Coast Line R. R. v. Public Service Comm., supra 77 F. Supp. at page 684.

"Another statement of the principle is that although the operation of the entire system yields a net profit, the loss resulting from the maintenance of a certain service on a particular branch must be of sufficient importance to outweigh the inconvenience which the public will suffer as a result thereof. 123 A.L.R. 928; Thompson v. Boston & Maine R. R., supra; Delaware L. & W. R. Co. v. Van Santvoord, supra.

"Again, it is said: 'The controlling criteria as we see it are these, the character and population of the territory served, the public patronage, or lack of it, the facilities remaining, the expense of operation as compared with revenue from same, and the operations of the carrier as a whole.' Atlantic Coast Line R. R. v. Public Service Comm., D. C., 77 F. Supp. 675, 684."

And Mr. Justice Foster further said at page 452:

"The questions for us on this appeal are, whether the commission erred in applying the law to the facts found (including due process), or whether the order was based on a finding of facts contrary to legal evidence of substantial weight, Alabama Public Service Comm. v. Southern Bell T. & T. Co., Ala. Sup., 42 So. 2d 655, unless we find it expedient to remand the case to the commission for further proceedngs or evidence. Title 48, section 82, Code."

From those two decisions it appears that the Supreme Court of Alabama has fully and clearly defined the guides to be observed by the Alabama Public Service Commission in performing its functions under the state statutes. There was no need for the three-judge district court to abstain from exercising its jurisdiction or to stay its hand pending any state court proceedings. And it will be further noted that the state supreme court recognized and held that the

Public Service Commission was *applying* the state law within the meaning of the language used by this court in deciding *Ex Parte Bransford*, 310 U. S. 354 (1940), so that a United States district court of three judges was essential.

We say with the utmost confidence that the railway's complaint in the district court fully and clearly pleaded a cause in equity and further that appellee had no remedy at law available in the federal court or in the state court. The state procedure for reviewing orders of the Alabama Public Service Commission, Sections 79, et seq., of Title 48, Alabama Code, 1940, is inadequate to afford appellee the relief it necessarily had to have to deal with the factual situation in our cases. If it should be thought such statutory procedure was adequate, we submit that assumption would be in error. The statutory review procedure was before the Supreme Court of Alabama in *Birmingham Electric Company* v. *Alabama Public Service Commission*, — Ala. —, 47 So. 2d 449 (1950) and *Birmingham Electric Company* v. *Alabama Public Service Commission*, — Ala. —, 47 So. 2d 455 (1950). The order of the Alabama Public Service Commission in that litigation was entered on March 19, 1948. The judge of the Circuit Court of Montgomery County granted an application for supersedeas and approved the bond filed, this being a rate case (47 So. 2d at 457). That proceeding was remanded to the Commission for taking of further evidence (47 So. 2d at 470). Unless there is some remedy somewhere, appellee railway, in the case at bar, tested by what happened to the Birmingham Electric Company, would have been running its trains and suffering tremendous losses from 1948 to 1950, and would still be running them pending a further hearing, whenever it suited the Alabama Commission to set the case, and then start all over again seeking a review in the Circuit Court of Montgomery County. It is not surprising that the railway sought the protection of the federal court, when confronted with the peremptory order of the Alabama Commission of December 5, 1949, entered on the citation that it issued, after denying the railway a hearing

thereon. For that order required restoration of the trains as of that date, And finally when confronted with the order of January 9, 1950, denying the application, the railway had to comply by restoring the trains or keep them off and risk the penalties.

IV.

CONCLUSION.

Appellants' Reply and Supplemental Brief adds nothing to their case. We submit the decree of the district court should be affirmed.

Respectfully submitted,

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APPENDIX.

Title 48, Code of Alabama 1940.

"§104. (9629, 9823) (5651) (3490) (1129) *Commission charged with duty of regulating and controlling transportation companies.*—The public service commission is charged with the duty of supervising, regulating, and controlling, all transportation companies doing business in this state, in all matters relating to the performance of their public duties, and their charges therefor, and of correcting abuses therein by such companies, and the commission shall, from time to time, prescribe and enforce against said transportation companies, in the manner herein authorized, such rates, charges, classifications of freight, storage, demurrage, and car service charges, rules, and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules, and regulations adopted or acted upon by any transportation company inconsistent with those prescribed by the commission acting within the scope of its authority, or inconsistent with those prescribed by any statute, shall be unlawful and void. And the commission shall enforce and require compliance with all the provisions of all laws now in force or hereafter enacted regulating railroads and other transportation companies or prescribing the duties thereof."

"§399. (5392) *Penalty for charging excessive rates, granting rebates, or violating commission's orders, etc.*—Any utility doing business in this state, or any of its authorized agents, officers or employees, who is guilty of knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama public service commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates, or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more

than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed to be a separate offense."

"§ 400. (5358) *Violations of statutes as to reasonable rates, adequate service and unjust discriminations; penalty.*—Every officer, agent, or employe of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court."

"§405. (5399) *Violating orders of public service commission; penalty for.*—Every officer, agent or employe of any common carrier or corporation, who shall violate, or who procures, aids or abets any violation of, or who shall fail to obey, observe or comply with any order of the public service commission, or any provisions of any order of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and comply with any such order or provision, shall be guilty of a misdemeanor, and upon conviction shall be fined a sum not exceeding five hundred dollars for each offense to be fixed by the court or judge trying the case."

"§ 406. (5400) *Venue of prosecution or indictment.*—Any officer, agent or employe shall be subject to indictment or prosecution in any county in which a subordinate agent or employe of the common carrier violates any of the provisions of this Code relating to the public service commission, or any rule or order of the public service commission, by the direction or in consequence of the direction of such officer, agent or employe.

IN THE

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OCTOBER TERM, 1950

No. 146

ALABAMA PUBLIC SERVICE COMMISSION, ET AL., APPELLANTS,

v.

SOUTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION BY SOUTHERN RAILWAY COMPANY, APPELLEE, FOR AN ORDER THAT THE MANDATE OF THIS COURT REQUIRE THE DISTRICT COURT TO RETAIN JURISDICTION PENDING APPELLEE'S RESORT TO THE STATE COURTS OF ALABAMA.

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Comes now, in due season, Southern Railway Company, appellee in the above-entitled cause, and moves this Honorable Court to include in its mandate which it will issue in the above-entitled cause a provision in terms directing

the United States District Court for the Middle District of Alabama to retain jurisdiction of the cause and continue in effect the injunction it issued therein on the thirteenth day of February, 1950 (R. 69) * for a reasonable time within which to permit appellee promptly to resort to the state courts of Alabama for determination and adjudication of its rights in the subject matter of this cause. In support of this motion appellee respectfully shows:

Mr. Chief Justice Vinson, in delivering the opinion of the Court in this cause, on May 21, 1951, said:

> "Appellee challenges the validity of an order of the Alabama Public Service Commission, but did not invoke the adequate state remedy provided for review of such orders. Therefore, as this case comes to us, it is governed by our decision in No. 395, decided this day, p. ——, *ante*. Accordingly, the judgment of the District Court is *Reversed*."

In No. 395, Mr. Chief Justice Vinson, delivering the opinion of the Court, said:

> "Not only has Alabama established its Public Service Commission to pass upon a proposed discontinuance of intrastate transportation service, but it has also provided for appeal from any final order of the Commission to the circuit court of Montgomery County as a matter of right. Ala. Code, 1940, § 79. That court, after a hearing on the record certified by the Commission, is empowered to set aside any Commission order found to be contrary to the substantial weight of the evidence or erroneous as a matter of law, id. § 82, and its decision may be appealed to the Alabama Supreme Court. Id. § 90. Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are 'supervisory in character.' *Avery Freight Lines, Inc.* v. *White*, 245 Ala. 618, 622-623, 18 So. 2d 394, 398 (1944)."

* Reference transcript of record.

And:

> "* * * Appellee complains of irreparable injury resulting from the Commission order pending judicial review, but has not invoked the protective powers of the Alabama courts to direct the stay or supersedeas of a Commission order pending appeal. Ala. Code, 1940, §§ 81, 84."

And:

> "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights."

The order of the Alabama Public Service Commission in its Docket 12221 denying appellee's application to discontinue operation of Trains 11 and 16 involved in this cause was issued January 9, 1950 (R. 55).

The thirty-day period provided under Alabama Code 1940, § 79, within which appellee, applicant before the state commission, might have entered its appeal from said order to the Circuit Court of Montgomery County, Alabama, has expired.

The two trains, Nos. 11 and 16, were discontinued following the entry of the decree in the United States District Court on February 13, 1950, in Civil Action No. 645.

In *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941), provision was made by this Court in keeping with appellee's motion here, for at page 501 of that opinion this Court said:

> "We therefore remand the cause to the district court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion."

In *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101 (1944), this Court again gave direction in keeping with the motion of appellee here, for, at page 106, it was said:

> "We therefore vacate the judgment of the Circuit Court of Appeals and remand the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with this opinion."

In the earlier case of *St. Louis &c. R. Co.* v. *Public Comm'n.*, 279 U. S. 560 (1929), the Railway had discontinued the operation of two passenger trains without preliminary application to the Alabama Commission for authority to discontinue them. The Railway on its bill filed in the United States District Court for the Middle District of Alabama obtained a restraining order to protect it incident to such discontinuance. This Court, holding that the Railway should have first made its application to the State Commission, vacated the decree of the District Court, but in that connection, at page 563, said:

> "* * * The Commission should give to the Railway the opportunity of presenting the facts; and if an application is made promptly, the matter should be determined by the Commission without subjecting the Railway to any prejudice because of its failure to ask leave before discontinuing the service. Compare *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 278 U. S. 228. To this end the decree will be vacated; and the restraining order will be continued."

Should this motion be denied, when Southern Railway Company, appellee here, resorts to the state courts of Alabama, it might be urged, and perhaps with success, by those in opposition, that Southern Railway Company by resorting to the United States District Court instead of taking its appeal under the state statute to the Circuit Court of Montgomery County within the thirty-day period

provided in the state statute, has thereby lost its right to such appeal and now comes too late for consideration to be given its case in the state courts.

Appellee ought not to be prejudiced by reason of the fact that it elected to resort to the federal district court below, which this Court unanimously holds had jurisdiction of its cause.

WHEREFORE, Southern Railway Company, appellee in this cause, moves the Court to provide in its mandate that the District Court retain jurisdiction and continue the injunction granted by it in order to permit appellee promptly to go to the Circuit Court of Montgomery County, Alabama, and there assert its rights in keeping with the pronouncement of this Court in its opinion rendered herein on May 21, 1951.

Respectfully submitted,

SIDNEY S. ALDERMAN,
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Attorneys for Appellee,
Southern Railway Company.

IN THE

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No. 146

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

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Appeal from the United States District Court for the Middle District of Alabama.

Comes now, in due season, Southern Railway Company, appellee in the above-entitled cause, and moves this Honorable Court to stay the issuance of the mandate from this Court to the United States District Court for the Middle District of Alabama by enlarging the time over and above the period of twenty-five days from the date the judgment was entered, to-wit, on May 21, 1951, sufficiently to permit appellee to take appropriate steps in the state courts of Alabama for determination and adjudication of its rights in the subject matter of this cause. In support of this motion, appellee respectfully shows:

The judgment of this Court was entered in this cause on May 21, 1951, reversing the judgment of the District Court.

On May 25, 1951, appellee filed with this Court its motion for an order providing that the mandate of this Court require the District Court to retain jurisdiction and continue in effect its injunctive decree (R. 69) pending appellee's resort to the state courts of Alabama.

On May 25, 1951, appellee's counsel forwarded a copy of said motion by United States mail to attorneys of record for appellants at Montgomery, Ala. This Court has not acted on appellee's motion. The date for adjournment of the present term of this Court is near at hand.

Since the judgment of this Court was rendered, appellee has filed with appellant, Alabama Commission, its further petition, supplementing and amending its original petition in said Commission Docket No. 12221. In such petition appellee seeks an order from said Commission authorizing appellee to withhold reestablishing operations of Trains No. 11 and No. 16 pending consideration and disposition of the appeal and proceedings thereon which appellee is now initiating in the Circuit Court of Montgomery County, Alabama. Defendant Commission has not yet acted on appellee's said petition, so far as appellee is advised at this time.

Necessarily defendant Commission must have sufficient time, over which appellee has no control, to prepare the record, being the testimony and documentary evidence heretofore introduced before it upon the hearings in Docket No. 12221, certify to the same and transmit it to the Circuit Court of Montgomery County, Alabama, as provided in the statutes of Alabama, for consideration and determination of appellee's appeal from and its motion for supersedeas or stay of defendant Commission's order of January 9, 1950, denying application to discontinue operation of Trains No. 11 and No. 16. The state statute provides that the record is to be transmitted to the Circuit Court "within thirty days after the perfecting of the appeal as aforesaid, and sooner if practicable, . . . "

Unless appellee's motion is granted it will necessarily be prejudiced immediately upon the receipt of the mandate of this Court in the District Court whereupon the District Court will vacate its injunctive decree heretofore issued in this cause and thereby leave appellee without protection pending action by the state court upon appellee's appeal to the Circuit Court of Montgomery County, Alabama, and its prayer therein for a supersedeas or stay of the defendant commission's order involved in this cause.

WHEREFORE, Southern Railway Company, appellee in this cause, moves the Court to stay the issuance of its mandate for such reasonable time as will permit appellee to perfect its appeal to the Circuit Court of Montgomery County and there assert its rights in keeping with the decision of this Court in its opinion rendered on May 21, 1951.

Respectfully submitted,

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Southern Railway Company.